Supreme Court, U.S.
FILED
MAR 11 1991
OFFICE OF THE CLERK

90-1419
No. ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

NATIONAL RAILROAD PASSENGER CORPORATION

and

CENTRAL VERMONT RAILWAY, INC.,
Petitioners,

v.

BOSTON AND MAINE CORPORATION, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

OF COUNSEL:

STEPHEN C. ROGERS
FREDERICK C. OHLY

NATIONAL RAILROAD
PASSENGER CORPORATION
60 Massachusetts Avenue, N.E.
Washington, D.C. 20002
(202) 906-3985

BASIL COLE
ROBERT P. VOM EIGEN,
Counsel of Record
CHARLES I. APPLER
THEODORE A. HOWARD
RICHARD F. RILEY, JR.

HOPKINS & SUTTER
888 Sixteenth Street, N.W.
Washington, D.C. 20006
(202) 835-8000

Counsel for Petitioners

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTIONS PRESENTED

Upon review of a final decision of the Interstate Commerce Commission approving an exercise by petitioner National Railroad Passenger Corporation of its delegated condemnation power under Section 402(d) of the Rail Passenger Service Act, 45 U.S.C. § 562(d), a two-judge majority of the the Court of Appeals rejected the Commission's interpretation of Section 402(d), substituted its own interpretation thereof, and voided the condemnation. While petitions for rehearing were pending, Congress enacted an amendment to Section 402(d), which it specifically intended to be applied in the instant case, to correct the erroneous reading of the statute by the court. However, the Court of Appeals denied rehearing, refusing to give effect to the legislative clarification.

The questions presented are:

1. Did the Court of Appeals substantially depart from the accepted and usual course of judicial proceedings in refusing to apply an amendment to Section 402(d) which Congress adopted to correct the court's prior interpretation of the statute, and which Congress specifically intended to be applied in this case?

2. Did the Court of Appeals undermine the principles of this Court's *Chevron* decision by disregarding the Commission's reasonable interpretation of Section 402(d), in favor of an "unambiguous" reading of Section 402(d) for which there is no basis in that statute's plain language and legislative history?

PARTIES TO THE PROCEEDING

Petitioners are the National Railroad Passenger Corporation ("Amtrak") and Central Vermont Railway, Inc. ("Central Vermont"). Respondent is the Boston and Maine Corporation ("B&M").*

Parties which participated in the proceedings below and are not listed in the caption of the case in this Court are the following:

1. The Interstate Commerce Commission
2. The United States of America
3. Windsor Minerals, Inc.
4. The State of Vermont
5. The Commonwealth of Massachusetts
6. Canadian Pacific, Ltd.
7. The Railway Labor Executives Association

---

* Amtrak is a national passenger railroad created by an act of Congress and incorporated in the District of Columbia. The United States Department of Transportation is its controlling shareholder, and the majority of its board of directors consists of federally-appointed members. Various commercial railroads maintain dormant equity interests in Amtrak, exercising no control and receiving no financial benefit by virtue of such interests. Central Vermont is a regional rail carrier serving New England, and is incorporated in the State of Vermont. All of its stock is owned by Grand Trunk Corporation, a non-carrier holding company incorporated in Delaware. Grand Trunk Corporation is wholly owned by the Canadian National Railway Company, a Crown corporation of Canada wholly owned by the Canadian government. B&M is a wholly-owned subsidiary of Guilford Transportation Industries, Inc., a privately-held corporation. These disclosures are made pursuant to Rule 29.1 of this Court's Rules.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
A. Factual Background	4
B. Proceedings Below	6
1. The Commission Decision	6
2. The Decision Of The Court Below	9
3. The Denial Of Rehearing	12
REASONS FOR GRANTING THE WRIT	13
I. THE COURT OF APPEALS SUBSTANTIALLY DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS IN REFUSING TO APPLY AN AMENDMENT TO SECTION 402(d) SPECIFICALLY INTENDED BY CONGRESS TO CORRECT THE COURT'S ERRONEOUS PRIOR INTERPRETATION OF THAT STATUTE	14
II. THE COURT BELOW IMPROPERLY REJECTED THE COMMISSION'S INTERPRETATION OF SECTION 402(d), WHICH WAS CONSISTENT WITH THE PLAIN LANGUAGE OF THE STATUTE AND ITS LEGISLATIVE HISTORY	17
III. THE DECISION BELOW DIRECTLY CONFLICTS WITH A DECISION OF THE SECOND CIRCUIT INVOLVING A PARALLEL STATUTE GOVERNING AMTRAK'S DELEGATED CONDEMNATION POWER	22

IV. IMPORTANT POLICIES AND OBJECTIVES OF THE RAIL PASSENGER SERVICE ACT WILL BE FRUSTRATED IF AMTRAK IS DEPRIVED OF ITS CONDEMNATION POWER PURSUANT TO THE DECISION BELOW 25

CONCLUSION 28

APPENDIX

Court of Appeals Order Denying Petitions for Rehearing and Suggestions for Rehearing *En Banc* 1a

Court of Appeals Decision 5a

Court of Appeals Order Granting Motions for Stay of Mandate 28a

Final Decision of the Interstate Commerce Commission (served August 9, 1988) 29a

Interim Decision of the Interstate Commerce Commission (served July 5, 1988) 110a

Interim Decision of the Interstate Commerce Commission (served May 25, 1988) 113a

Interim Decision of the Interstate Commerce Commission (served April 29, 1988) 119a

Section 305(d) of the Rail Passenger Service Act, As Amended, 45 U.S.C. § 545(d) (1988) 136a

Section 402 of the Rail Passenger Service Act, As Amended, 45 U.S.C. § 562 (1988) . 139a

The Independent Safety Board Act Amendments of 1990, Pub. L. No. 101-641, § 9, 104 Stat. 4658 (November 28, 1990) 145a

TABLE OF AUTHORITIES

Page

CASES:

American Tobacco Co. v. Patterson, 456 U.S. 63 (1982) 18

Boston & Maine Corp. v. Interstate Commerce Commission, 911 F.2d 743 (D.C. Cir. 1990), *reh'g denied*, Nos. 88-1631 *et al.*, Order (D.C. Cir. February 1, 1991) (*per curiam*) ..... 10, *passim*

Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 17,18,20,21

City of Philadelphia v. Baker, 508 F.2d 279 (3d Cir.), *cert. denied*, 422 U.S. 1042 (1975) 26

Immigration and Naturalization Service v. Cardoza-Fonseca, 480 U.S. 421 (1987) 20

Kaiser Aluminum & Chemical Corp. v. Bonjorno, ___ U.S. ___ , 110 S. Ct. 1570 (1990) 14,15,16

K Mart Corp. v. Cartier, Inc., 486 U.S. 281 (1988) 17

Mead Corp. v. Tilley, ___ U.S. ___ , 109 S. Ct. 2156 (1989) 18

Mills Music, Inc. v. Snyder, 469 U.S. 153 (1985) . 18

National Railroad Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. Co., 470 U.S. 451 (1985) 26

National Railroad Passenger Corp. v. Boston & Maine Corp., 850 F.2d 756 (D.C. Cir. 1988) .. 5

National Railroad Passenger Corp.—Conveyance of Boston and Maine Corp. Interests in Connecticut River Line in Vermont and New Hampshire, ICC Finance Docket 31250, Interim Decision (served April 29, 1988) 6

National Railroad Passenger Corp.—Conveyance of Boston and Maine Corp. Interests in Connecticut River Line in Vermont and New Hampshire, ICC Finance Dockets 31250 and 31259, Interim Decision (served May 25, 1988) 7

Table of Authorities Continued

Page

National Railroad Passenger Corp.—Conveyance of Boston and Maine Corp. Interests in Connecticut River Line in Vermont and New Hampshire, 4 I.C.C.2d 761 (1988) 7

National Railroad Passenger Corp. v. Two Parcels of Land, 822 F.2d 1261 (2d Cir.), *cert. denied*, 484 U.S. 954 (1987) ..... 12, *passim*

New York City Transit Authority v. Beazer, 440 U.S. 568 (1979) 13

STATUTES:

Amtrak Improvement Act of 1973, Pub. L. No. 93-146, 87 Stat. 548 (1973) 19,23

Independent Safety Board Act Amendments of 1990, Pub. L. No. 101-641, § 9, 104 Stat. 4658 (1990) 12,14

Interstate Commerce Act, 49 U.S.C. § 11343 (1988) 16

Rail Passenger Service Act of 1970, as amended:

Section 101(a), 45 U.S.C. § 501(a) (1988) 26

Section 305(d), 45 U.S.C. § 545(d) (1988) 23,24

Section 402(a), 45 U.S.C. § 562(a) (1988) . 7, *passim*

Section 402(c), 45 U.S.C. § 562(c) (1988) 26

Section 402(d), 45 U.S.C. § 562(d) (1988) . 3, *passim*

Section 402(e), 45 U.S.C. § 562(e) (1988) 26

Section 402(f), 45 U.S.C. § 562(f) (1988) 26

Section 601, 45 U.S.C. § 601 (1988) 3

Supplemental Appropriations Act, 1987, Pub. L. No. 100-71, 101 Stat. 391 (1987) 5

Table of Authorities Continued

Page

LEGISLATIVE MATERIALS:

Amtrak Improvement Act of 1973, Pub. L. No. 93-146:

Conf. Rep. No. 587, 93d Cong., 1st Sess. 4 (1973), *reprinted in* 1973 U.S. Code Cong. & Admin. News 2331 21

S. Rep. No. 226, 93d Cong., 1st Sess. 4 (1973), *reprinted in* 1973 U.S. Code Cong. & Admin. News 2324 19

Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210:

S. Rep. No. 499, 94th Cong., 1st Sess. 104, *reprinted in* 1976 U.S. Code Cong. & Admin. News 14 23

Independent Safety Board Act Amendments of 1990, Pub. L. No. 101-641:

136 Cong. Rec. S17668 (daily ed. October 27, 1990) 15

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. ___

NATIONAL RAILROAD PASSENGER CORPORATION

and

CENTRAL VERMONT RAILWAY, INC.,

Petitioners,

v.

BOSTON AND MAINE CORPORATION, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners National Railroad Passenger Corporation ("Amtrak") and Central Vermont Railway, Inc. ("Central Vermont") respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered on August 10, 1990, and its Order denying rehearing entered on February 1, 1991.

OPINIONS BELOW

The full opinion of the court below dated August 10, 1990, reported at 911 F.2d 743 (D.C. Cir. 1990), is re-

produced in the Appendix hereto ("App."), *infra*, at 5a-27a. The unreported order issued by the court below on February 1, 1991 denying petitions for rehearing and suggestions for rehearing *en banc* is reproduced in the Appendix at 1a-4a. The unreported order issued by the court below on February 25, 1991 granting motions to stay the issuance of its mandate is reproduced in the Appendix at 28a. The final decision of the Interstate Commerce Commission served August 9, 1988, reported at 4 I.C.C.2d 761 (1988), which was reviewed by the court below, is reproduced in the Appendix at 29a-109a. The Interstate Commerce Commission's unreported interim decisions served July 5, 1988, May 25, 1988 and April 29, 1988, are reproduced in the Appendix at 110a-112a, 113a-118a and 119a-135a, respectively.

JURISDICTION

The judgment of the court below was entered on August 10, 1990. App. 5a-27a. Petitioners Amtrak and Central Vermont, together with certain other intervening parties below, jointly filed a timely Petition for Rehearing and Suggestion for Rehearing *En Banc* on September 24, 1990. The Interstate Commerce Commission (the "Commission"), a respondent below, also sought rehearing. These Petitions were denied on February 1, 1991. App. 1a-4a. On February 25, 1991, the court below granted motions to stay its mandate until March 11, 1991, pending applications to this Court for a writ of certiorari. App. 28a. This Petition for Writ of Certiorari was filed thereafter on March 11, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The decision of the court below and the denial of the petitions for rehearing rest upon the court's interpretation of Section 402 of the Rail Passenger Service Act

("RPSA"), 45 U.S.C. § 562 (1988), and a 1990 amendment to Section 402(d)(1) of the RPSA, The Independent Safety Board Act Amendments of 1990, Pub. L. No. 101-641, § 9, 104 Stat. 4654, 4658 (November 28, 1990). In denying rehearing, the court also interpreted Section 305(d) of the RPSA, 45 U.S.C. § 545(d) (1988). These statutory provisions are reprinted in full in the Appendix at 136a-145a.

STATEMENT OF THE CASE

This case presents important questions arising under the RPSA, the statute that governs the federal program for providing long-distance rail passenger transportation in this country. At issue is the scope of Amtrak's statutory authority to condemn the property of another railroad where the property is required for Amtrak's federally-funded service. Also at issue is the power of a federal appellate court to overrule permissible interpretations of law by an expert administrative agency concerning a statute administered by the agency, and to ignore a precisely targeted statute that Congress expressly intended be applied to the case before the court.

Congress created Amtrak in 1970, pursuant to the RPSA, in order to ensure the provision of modern, efficient, cost-effective intercity rail passenger service on a nationwide basis. Because such service has not been operated profitably for several decades, Congress supports Amtrak with both capital grants and annual operating subsidies. *See generally* 45 U.S.C. § 601. Congress amended the RPSA in 1973, granting Amtrak, in Section 402(d), the power to condemn railroad property when Amtrak determines that acquisition of control of that property best meets its needs in connection with providing intercity rail passenger service. When the court below issued its first decision in this case, greatly inhibiting Amtrak's exercise of that delegated condemnation power, Congress acted again, while the petitions for rehearing were pending,

promptly amending Section 402(d) in order to correct the court's erroneous reading of the statute and to affect specifically the outcome in this case. The court's subsequent denial of rehearing, based on its conclusion that the amendment was inapplicable, was an impermissible result and constitutes an extraordinary circumstance calling for review by this Court.

A. Factual Background

Amtrak's exercise of its Section 402(d) condemnation authority in April of 1988 to acquire a 48.8-mile segment of the Connecticut River Line ("the Line"), then owned by B&M, was the culmination of several years of unsatisfactory dealings between Amtrak and B&M regarding maintenance of the Line. From 1972 until April 1987, the Line served as a part of the route for Amtrak's *Montrealer* passenger trains between Washington, D.C. and Montreal, Canada. In 1977, Amtrak and B&M negotiated an operating agreement that governed the operation of the *Montrealer* on B&M's lines until the agreement was unilaterally terminated by B&M in 1987. B&M agreed to exercise its "best efforts" to maintain its rail lines to permit passenger trains to operate "at not less than" the speeds prescribed in the agreement and, from 1977 to 1981, B&M maintained the Line sufficiently to allow generally satisfactory on-time performance by the *Montrealer*.

In the early eighties, maintenance of the Connecticut River Line by B&M significantly decreased, with an inevitable adverse impact on Amtrak's service. From May 1986 through April 5, 1987, when Amtrak discontinued *Montrealer* service due to deterioration of the Line, not one train met its contractually agreed-upon schedule, and 47 of the segment's 49 miles were subject to speed restrictions—many as low as 10 m.p.h. B&M traffic was being rerouted off the Connecticut River Line onto a parallel line that had been acquired by B&M's corporate parent, Guilford Transportation Industries, Inc. ("Guilford"),

and Amtrak was informed that the Line did not require additional work to meet B&M's needs for freight train operations. After litigation to compel B&M to participate in contractually agreed-upon arbitration—*see National Railroad Passenger Corp. v. Boston & Maine Corp.*, 850 F.2d 756 (D.C. Cir. 1988)—Amtrak obtained an arbitration decision in 1988 that B&M had breached its contractual obligation to maintain the Connecticut River Line.

Amtrak was confronted with a dilemma. Congress had appropriated $5 million for the specific purposes of upgrading the Connecticut River Line so that the *Montrealer* could be resumed.[1] However, in light of B&M's past performance, Amtrak was justifiably reluctant to devote a substantial portion of those funds to the rehabilitation of B&M's segment of the Line without a commitment to long-term maintenance which B&M, in negotiations, proved unwilling to provide. On the other hand, Amtrak's funds simply were insufficient to allow it to purchase the Line, fully rehabilitate it, *and* finance the long-term maintenance thereof. Thus, faced with the real possibility that restoration of the *Montrealer* might be impossible, Amtrak entered into negotiations with Central Vermont.[2] These negotiations yielded, in March of 1988, several agreements under which Amtrak would purchase or condemn the Connecticut River Line and then transfer fee title to Central Vermont; Amtrak would pay Central Vermont up to $3.1

---

[1] Supplemental Appropriations Act, 1987, Pub. L. No. 100-71, 101 Stat. 391, 447-448 (July 11, 1987).

[2] Central Vermont owned segments of the Connecticut River Line adjoining the segment owned by B&M, and for many decades the two carriers operated over each other's portions of the Line pursuant to trackage rights agreements. The deterioration of B&M's segment of the Line had a significant detrimental impact on Central Vermont's freight service and increased Central Vermont's operating expenses. Unlike B&M, Central Vermont had no parallel route over which to provide freight service. Thus, when Amtrak turned to Central Vermont after being unable to reach a satisfactory arrangement with B&M, Central Vermont was quite naturally receptive.

million to promptly upgrade the Line to a condition suitable for Amtrak's high-speed passenger service; and Central Vermont would maintain the Line in such condition for a period of 20 years and allow operation of Amtrak's service during that time on a basis that justified the investment of federal funds by Amtrak. When B&M declined Amtrak's offer to purchase the Line, Amtrak initiated Section 402(d) proceedings before the Commission.

B. Proceedings Below

1. The Commission Decision

Section 402(d) requires that Amtrak and the prospective condemnee rail carrier be "unable to agree upon terms for the sale to [Amtrak] of [the] property" Amtrak proposes to condemn. *See* 45 U.S.C. § 562(d)(1). The statute then sets out two considerations by which the Commission is to assess the validity of the proposed taking. Amtrak's need for the property "shall be deemed to be established" unless the Commission finds both that the condemnation significantly impairs the condemnee railroad's ability to carry out its obligations as a common carrier, and that Amtrak's need for the property for purposes of providing rail passenger service could be met by the acquisition of alternative property. 45 U.S.C. §§ 562(d)(1)(A), (B). The statute authorizes the Commission to prescribe reasonable terms and conditions, including just compensation, for the condemnation.

In an interim decision served April 29, 1988, the Commission found that, in light of Amtrak's history of unsatisfactory dealings with B&M and B&M's rejection of Amtrak's valid offer to purchase the Line, "Amtrak has sufficiently demonstrated that the parties have not been able to agree on the sale of the line," within the meaning of the statute. *National Railroad Passenger Corp.—Conveyance of Boston and Maine Corp. Interests in Connecticut River Line in Vermont and New Hampshire*, ICC Finance

Docket 31250, Slip op. at 7 (served April 29, 1988). App. 131a. In a second preliminary ruling, the Commission addressed and rejected B&M's verified petition requesting that the Commission convert Amtrak's Section 402(d) application into an application for trackage rights on the Connecticut River Line under Section 402(a) of the RPSA, 45 U.S.C. § 562(a). It held that Amtrak was entitled to determine, in its discretion, that the property interests available to it pursuant to the provisions of Section 402(a) were inadequate to meet its needs. *National Railroad Passenger Corp.—Conveyance of Boston and Maine Corp. Interests in Connecticut River Line in Vermont and New Hampshire*, ICC Finance Dockets 31250 and 31259, Slip op. at 2 & n.1 (served May 25, 1988). App. 114a-116a.

Having resolved these issues going to the right of Amtrak to proceed under Section 402(d),[3] the Commission, in its final decision, addressed the specific statutory criteria imposed by Congress in Section 402(d) as the *sole* limitations upon Amtrak's exercise of its condemnation authority under the statute. App. 45a-46a. Addressing Section 402(d)(1)(B) first, the Commission considered and rejected each of the rail routes identified by the parties as possible alternative means for Amtrak to accomplish its objectives of resuming the *Montrealer* and providing passenger train service to certain areas of New England which were left without such service when the *Montrealer* was discontinued. 4 I.C.C.2d at 772-73. App. 46a. Although not required to do so in light of its finding that Amtrak could not meet its needs through the acquisition of alternative property,

---

[3] In its final decision, the Commission reaffirmed the determinations made in its interim decisions of April 29 and May 25, 1988. *See National Railroad Passenger Corp.—Conveyance of Boston and Maine Corp. Interests in Connecticut River Line in Vermont and New Hampshire*, 4 I.C.C.2d 761, 768-69 & n.8, 770 (1988). App. 40a, 42a. The Commission also declined B&M's invitation to find, based on various arguments, that Section 402(d), as interpreted by the Commission, is unconstitutional. *Id.* at 771-72. App. 43a-45a.

the Commission also considered the separate question, under Section 402(d)(1)(A), of the impact of the condemnation on B&M's ability to meet its continuing common carrier obligations. In that regard, the Commission found that in addition to being awarded just compensation, "[B&M] has the option of retaining its local traffic [on the Connecticut River Line] through a trackage rights agreement. Its ability to carry out its common carrier obligations . . . will not be impaired." *Id.* at 773. App. 46a. Thus, finding neither of the independent statutory criteria limiting Amtrak's condemnation power to be satisfied, the Commission concluded "that Amtrak has established its need under § 402(d) to warrant conveyance of the Conn River Line for the restoration of the Montrealer passenger service." *Id.* The Commission made no attempt to assess Amtrak's "need" for the property other than in accordance with the clear statutory standards.

Also in its final decision, the Commission resolved the issues presented in *Central Vermont Railway, Inc.—Petition for Exemption—Acquisition and Operation of Certain Interests in Rail Lines from the National Railroad Passenger Corp.*, ICC Finance Docket 31259, wherein Central Vermont sought an exemption, pursuant to 49 U.S.C. § 10505, from plenary Commission review, under 49 U.S.C. §§ 11343 *et seq.*, of its acquisition from Amtrak of title to the Connecticut River Line property condemned by Amtrak. Based upon its findings that: (1) a grant of trackage rights to B&M would ensure a continuation of its ability to compete on the Connecticut River Line; (2) Central Vermont's ability to compete with B&M for new traffic on the Line would be procompetitive; (3) Central Vermont's upgrading and maintenance of the Line would enhance its own *and* B&M's ability to provide competitive service; (4) the exemption would enable Central Vermont to undertake rehabilitation of the Line on an expedited basis in furtherance of Congress's intent in appropriating funds for that purpose; and (5) the directly-affected

States—Massachusetts, New Hampshire and Vermont—all favored the transaction, the Commission concluded that the exemption sought by Central Vermont should be granted. *Id.* at 800-01. App. 84a-85a.[4]

2. The Decision Of The Court Below

In its Petition for Review filed in the Court of Appeals pursuant to 28 U.S.C. §§ 2321, 2342, B&M argued that the Commission had misinterpreted and misapplied Section 402(d). B&M insisted that all Amtrak actually needed to acquire for purposes of restoring its *Montrealer* service was *joint use* with B&M of the Connecticut River Line, and not full ownership and control of the Line. The Commission, as respondent, and Amtrak, Central Vermont and others, argued, conversely, that the underlying factual record showed that Amtrak's condemnation met the statutory requirements and was well justified in light of B&M's long-standing failure to maintain the Connecticut River Line and Amtrak's need to protect Congress's substantial investment in the rehabilitation of the Line. They also argued that the trackage rights the Commission provided B&M adequately protected B&M's competitive posture on the Line, and that the reconveyance of the Line from Amtrak to Central Vermont presented no genuine statutory or constitutional concerns.

The crux of the decision of the court below is the panel majority's total acceptance of B&M's contentions regarding Amtrak's allegedly improper purposes in seeking condemnation of B&M's property. Adopting the factual

---

[4] The Vice-Chairman of the Commission, Commissioner Andre, did not participate in the final decision. Chairman Gradison filed a dissenting opinion, arguing, in essence, that Amtrak was being permitted to condemn property in excess of that "required [by Amtrak] for intercity rail passenger service" within the meaning of the statute, and questioning whether the condemnation satisfied the "public use" requirement of the Fifth Amendment. *See* 4 I.C.C.2d at 808-14. App. 95a-105a.

allegations in B&M's briefs, the majority held that Amtrak may not condemn any interest in rail property which it does not intend to retain thereafter in its own hands. *See generally Boston & Maine Corp. v. Interstate Commerce Commission*, 911 F.2d 743, 749 (D.C. Cir. 1990) ("The issue . . . is whether Amtrak has the authority to use section 402(d) to effect a change in ownership of rail lines between other parties. . . . [W]e conclude that the [RPSA] does not permit Amtrak to take property by eminent domain for which it concededly has no need itself . . . ."). App. 15a.

The panel majority undertook an independent assessment of Section 402(d)'s language, context and legislative history. It construed Section 402(d) differently than the Commission had, and found that the meaning of the statute was "unambiguous". The court stated that:

> It is clear enough that the statute contemplates that the property acquired by condemnation must be required by Amtrak for *its* use, as it alone is engaged in intercity rail passenger service. Yet, in the case before us, it is evident that the conveyance to Amtrak was one in form only, a necessary formality in consummating a scheme whose purpose was to effect a transfer of B&M's property not to Amtrak, but to Central Vermont.

Id. at 750 (emphasis in original; citations omitted). App. 17a.

The court found that the Commission erred in failing to give full consideration to B&M's contentions that the only interest actually "required [by Amtrak] for intercity rail passenger service" within the meaning of the statute was "use [of the Connecticut River Line] in a condition permitting resumption of the Montrealer service," and that Amtrak could have met its needs by some means short of condemning a fee interest in the Line. *Id.* App. 18a. In this regard, the court below rejected the Commission's

factual findings that Amtrak "needed" not only use of a rehabilitated Connecticut River Line but also the assurance that the tracks would be held and properly maintained by a responsible owner—*i.e.*, Central Vermont—on an on-going basis. *Id.* at 751. App. 20a. The court below also stated that an interpretation of the statute which would permit Amtrak to condemn one private railroad's property in contemplation of immediate reconveyance thereof to another would give rise to "at least colorable Fifth Amendment problems[.]" *Id.* at 752. App. 21a.[5]

Concluding, the court below stated that the Commission's interpretation of Section 402(d) permitted Amtrak "to circumvent the requirements of section 402(a)" and that the Commission's "construction of the phrase 'required for intercity rail passenger service' contravenes the plain meaning of section 402(d)[.]" *Id.* at 753. App. 23a.

Writing separately to concur only in the result—*i.e.*, remand to the Commission—Judge Ruth B. Ginsburg disagreed with the interpretation of Section 402 adopted by the majority, observing that "[n]othing in the text of the RPSA, or in its legislative history," required Amtrak to proceed under Section 402(a), or seek condemnation of a mere easement under Section 402(d), in order to accomplish its objectives in this case. 911 F.2d at 753-54 & n.* (Ginsburg, J., concurring in the result). App. 24a-25a.[6]

---

[5] The court also opined, adopting arguments by B&M never made to the Commission, that its interpretation of Section 402(d) was dictated by Congressional "policy against cross-subsidization, that is, against having one segment of the rail industry bear the expense of facilities and improvements of primary benefit to another." 911 F.2d at 752 (citation omitted). App. 22a.

[6] Judge Ginsburg believed a remand to the Commission was required based on her opinion that the Commission made insufficient findings of fact to support its approval of Amtrak's determination that taking a full fee interest in the Connecticut River Line was "required for intercity rail passenger service." 911 F.2d at 754-55. App. 25a-27a.

3. The Denial Of Rehearing

The petitions for rehearing initially focused upon the failure of the court below to extend proper deference to the Commission's interpretation of Section 402(d), and highlighted the significant errors in the court's interpretation of the statute and in its *de novo* findings of fact. The petitions also pointed out the fundamental conflict between the majority's decision and the holding of the Second Circuit in *National Railroad Passenger Corp. v. Two Parcels of Land*, 822 F.2d 1261 (2d Cir.), *cert. denied*, 484 U.S. 954 (1987).

While the petitions were pending, Congress took action to clarify Section 402(d) by means of amendment, so as to correct what Congress plainly regarded as an erroneous interpretation of the statute by the court. Thus, Congress added a sentence to the end of Section 402(d)(1), stating as follows:

> [Amtrak] may subsequently convey title or other interest in such [condemned] property to a third party, if such reconveyance is found by the [Interstate Commerce] Commission to further the purposes of [the RPSA].

The Independent Safety Board Act Amendments of 1990, Pub. L. 101-641, § 9(a), 104 Stat. 4654, 4658 (November 28, 1990). App. 145a. The amendment was explicitly made applicable to pending cases. *Id.*, § 9(b).

Notwithstanding the intervening legislative clarification of Section 402(d), the court below denied rehearing. The court acknowledged that Congress intended that the amendment be applied in the instant case. *Boston & Maine Corp. v. Interstate Commerce Commission*, Nos. 88-1631 *et al.*, Order at 3 (D.C. Cir. February 1, 1991) (*per curiam*). App. 3a. The court nonetheless refused to apply the amendment, because it "does not affect the requirement that the property that is subsequently conveyed may not be condemned in the first place if it is not 'required for

intercity rail passenger service.' " *Id.* The court below also concluded that the Second Circuit's decision in the *Two Parcels* case was distinguishable. Thus, the earlier determination by the two-judge majority below was sustained. Judge Ginsburg specifically reiterated her disagreement with the majority's reading of Section 402(d).[7]

REASONS FOR GRANTING THE WRIT

The legislative clarification of Section 402(d) resolved, beyond doubt, that the statutory interpretation adopted by the court below was fundamentally flawed and incorrect; it also imposed a specific legal standard for the court to apply in any further proceedings in this case. The court's denial of rehearing, under these circumstances, goes beyond mere error. Rule 10.1(a) of this Court's Rules recognizes this Court's authority to exercise its supervisory review powers in certain cases where the nature and magnitude of a lower court's error is so extraordinary as to constitute a substantial departure "from the accepted and usual course of judicial proceedings."[8] Here, the blatant disregard demonstrated by the court below for the clear will and intent of Congress justifies petitioners' invocation of that standard. Moreover, even if the court below had not so clearly erred in failing to apply the Congressional amendment, review is still appropriate since the court's initial rejection of the Commission's interpretation of the RPSA contravened this Court's *Chevron* decision and its progeny, and is in irreconcilable conflict with a decision of the Second Circuit. Finally, important policy considerations counsel in favor of granting the writ.

---

[7] Judge Ginsburg noted that the amendment "coincides with my view that the Interstate Commerce Commission (ICC) plausibly interpreted section 402[.]" App. 4a (citations omitted).

[8] *See, e.g., New York City Transit Authority v. Beazer*, 440 U.S. 568, 570-71 & n.1 (1979).

I. THE COURT OF APPEALS SUBSTANTIALLY DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS IN REFUSING TO APPLY AN AMENDMENT TO SECTION 402(d) SPECIFICALLY INTENDED BY CONGRESS TO CORRECT THE COURT'S ERRONEOUS PRIOR INTERPRETATION OF THAT STATUTE

Last term, in *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, ___ U.S. ___, 110 S. Ct. 1570 (1990), this Court held that where Congress alters an existing statute during the pendency of an appeal involving the statute, the applicability of the legislative amendment is determined by reference to expressed Congressional intent. This Court concluded that the pre-amendment law governed, in light of the evidence of clear Congressional intent to that effect. 110 S. Ct. at 1577. This conclusion was required, according to the Court, by the general rule in cases involving statutes amended during the pendency of litigation that "where the congressional intent is clear, it governs." *Id.* (citations omitted). The court below flatly disregarded that rule in this case.

When Congress amended Section 402(d), it specifically intended to correct the erroneous interpretation of that statute adopted by the court below. In substance, the amendment states: "[*Amtrak*] *may subsequently convey title or other interest in* [*condemned*] *property to a third party*, if such reconveyance is found by the Commission to further the purposes of this Act." The Independent Safety Board Act Amendments of 1990, Pub. L. No. 101-641, § 9(a) (emphasis added). App. 145a. Congress left no doubt that this amendment to Section 402(d) was to apply to pending litigation—*i.e.*, the instant case. "The amendment . . . *shall apply* to any proceeding instituted before, on, or after the date of enactment of this Act *(including any proceeding pending before any Federal court on such date of enactment)*." *Id.*, § 9(b) (emphasis added). The legislative history, as elaborated by the sponsor of the amendment, confirms the point. *See* 136 Cong. Rec. S17668 (daily ed. October 27, 1990) (statement of Sen. Jeffords):

> A recent court decision has jeopardized the continued operation of Amtrak's only passenger train to Vermont by restricting its eminent domain authority. *The new provision makes clear that the court misconstrued that authority when it questioned Amtrak's subsequent conveyance of the rail line it acquired.*
>
> This amendment clarifies that, with this and any future case, Amtrak can convey interests in condemned property to a third party when such conveyance furthers Amtrak's statutory purpose under the Rail Passenger Service Act, as it did in the Montrealer situation. This leaves the structuring of the nationwide passenger rail system to Amtrak's considered discretion, as the Rail Passenger Service Act intends. [Emphasis added.]

In light of this Court's recent statement in *Kaiser Aluminum* that "where the congressional intent is clear, it governs," 110 S. Ct. at 1577, rehearing should have been granted, and the Commission's decision should have been reinstated and affirmed.

The court below did not dispute that Congress intended the amendment to apply, but it nevertheless refused to apply it, purportedly on the basis that Amtrak's condemnation of a fee interest in the Connecticut River Line was invalid "in the first place". It stated that "[t]he court construed Section 402 to preclude Amtrak from resorting to its subsection (d) power to effect an outright change in ownership between competing railroads if it could instead achieve the objective necessary for passenger service by taking a lesser interest or by using its subsection (a) power." Order at 3. App. 3a. Even if such a determination

by the court were correct at the time it initially ruled on the Commission decision, it plainly was no longer valid when the court acted on the petitions for rehearing. After the initial decision, Congress looked at the transaction that the court had overturned and adopted legislation authorizing Amtrak to reconvey interests in property it has obtained through its exercise of its Section 402(d) condemnation authority. In other words, in response to the court's initial decision, Congress specifically provided that Amtrak *could* condemn larger interests in property than it intended to retain.

If a condemnation by Amtrak under Section 402(d) is invalid "in the first place" to the extent that the property interest to be condemned exceeds that which Amtrak intends to keep for itself, as the court below held, then the Congressional amendment to the statute is rendered meaningless. Under that view, Amtrak could *never* condemn any interest in property in excess of what it intends to keep. How then could it ever *reconvey* condemned interests to a third party pursuant to Section 402(d) as amended?[9]

Seen in this light, Congress could have had no other intention than to *validate* precisely the form of condemnation/reconveyance transaction that the court below, by denying rehearing, has precluded. Senator Jeffords' explanation of the amendment leaves no doubt in this regard. Under *Kaiser Aluminum*, the court below was not at liberty to disregard the clear will of Congress by refusing to apply the amendment to Section 402(d). The amendment

[9] Since the Interstate Commerce Act, as amended, already provides authority for railroads, including Amtrak, to transfer lawfully acquired rail property to other carriers, *see* 49 U.S.C. § 11343, the amendment to Section 402(d) must have been intended to serve a different purpose—*i.e.*, to clarify that Amtrak may condemn an interest in property greater than what it specifically intends to keep for itself, and reconvey interests in what it condemns to a third party, so long as the whole two-step transaction facilitates Amtrak's satisfaction of its statutory objectives under the RPSA.

effectively limited the court's options: the court could either conclude that the Commission's prior findings were adequate, or remand the case for a determination by the Commission, in the first instance, as to whether Amtrak's reconveyance of the condemned property to Central Vermont would "further the purposes of [the RPSA]." Denial of rehearing in these circumstances thus violated not only the substantive result intended by Congress, but also the procedures by which Congress intended that result to be reached. The court below failed to implement the amendment and precluded the Commission from doing so. A writ should issue to allow this Court to correct the lower court's clear and substantial error.

II. THE COURT BELOW IMPROPERLY REJECTED THE COMMISSION'S INTERPRETATION OF SECTION 402(d), WHICH WAS CONSISTENT WITH THE PLAIN LANGUAGE OF THE STATUTE AND ITS LEGISLATIVE HISTORY

In *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), this Court articulated the principles governing judicial review of interpretations by administrative agencies of the statutes they are entrusted by Congress with the duty to administer. Those principles, which were recently restated by this Court in *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281 (1988), indicate that a reviewing court may reject an agency's reading of a statute it administers only when that statute is "clear and unambiguous". If the language of the statute does not clearly address the legal issue before the agency, the reviewing court's function is only to determine whether the agency's interpretation reflects a "permissible construction of the statute." 486 U.S. at 291-92. If the agency's reading of the statute is "permissible", the reviewing court is bound by that reading. *Id.*

The majority below paid lip service to these principles, 911 F.2d at 749 (App. 15a-16a), but independently concluded that the language of Section 402 is unambiguously

contrary to the Commission's interpretation thereof. *Id.* App. 16a. However, this Court did not intend for the careful analytical framework it established in *Chevron* to be circumvented in the high-handed manner exhibited by the court below, which used a baseless finding of statutory "clarity" to supplant the Commission's reading of Section 402(d) with its own.

In employing the methodology established by this Court in *Chevron*, a reviewing court must ask first "whether Congress has *directly* spoken to the *precise question* at issue." *See* 467 U.S. at 842 (emphasis added). For this purpose, the court must "turn first to the language of the statute." *Mead Corp. v. Tilley*, ___ U.S. ___, 109 S. Ct. 2156, 2162 (1989) (citations omitted). In so doing, "it is appropriate to assume that the ordinary meaning of the language that Congress employed 'accurately expresses the legislative purpose.' " *Mills Music, Inc. v. Snyder*, 469 U.S. 153, 164 (1985) (footnote omitted); *see also American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982).

The court below purports to have examined "the language . . . of subsection (d) and the structure of section 402" in reaching its conclusions that (i) the statute unambiguously prevents Amtrak from condemning property under Section 402(d) where a lesser interest in property obtainable under Section 402(a) might be sufficient for Amtrak's needs in providing rail passenger service, and (ii) Section 402(d) unambiguously limits the scope of Amtrak's condemnation power to the acquisition of only such property interests as Amtrak intends to retain as its own. *See* 911 F.2d at 749. App. 16a. However, subsections (a) and (d) of Section 402, respectively, are *utterly silent* with regard to the limitations on Amtrak's condemnation power imposed by the court below.

Section 402(a) enables Amtrak to ask the Commission to compel Amtrak's use of tracks and facilities owned by other railroads, and to fix the terms and conditions of

Amtrak's payment for such use to the extent that Amtrak and the other railroad cannot agree. App. 139a. Section 402(d), which was enacted three years later, addresses *condemnation* by Amtrak of the property of another railroad, for purposes of its provision of intercity rail passenger service, when the other railroad is unwilling to sell the property voluntarily. App. 141a. The provisions address distinct subjects, and neither subsection even *mentions* the other. Section 402(d) contains no language, plain or otherwise, limiting Amtrak's exercise of its condemnation power to only those situations where its need for property in furtherance of providing rail passenger service cannot be satisfied by proceeding pursuant to Section 402(a). Nor did subsection (d) *on its face*—even prior to the recent clarifying amendment—limit Amtrak's exercise of its condemnation power to the acquisition of only such interest in property as Amtrak intended to continue to own indefinitely.

The court below believed that its "unambiguous" construction of Section 402(d) was supported by the legislative history of the Amtrak Improvement Act of 1973, Pub. L. No. 93-146, 87 Stat. 548, which amended Section 402 of the RPSA by adding subsection (d). *See* 911 F.2d at 749. App. 16a-17a. The cited legislative history, however, simply does not support the court's interpretation; if anything, the Congressional intent reflected therein *conflicts* with the court's "unambiguous" reading. The legislative history recognizes that certain properties which may be available under Section 402(a) may nevertheless be *inadequate* for Amtrak's purposes, due to economic or other considerations.[10] Nothing in the legislative history of Section 402(d) supports the view that Amtrak is precluded from invoking

---

[10] "[Leased] facilities are not always best adapted to Amtrak's needs, *nor is a lease always the most economical means by which Amtrak could fulfill its requirements for a facility.*" S. Rep. No. 226, 93d Cong., 1st Sess. 4 (1973), *reprinted in* 1973 U.S. Code Cong. & Admin. News 2324, 2327 (emphasis added), *cited in* 911 F.2d at 749. App. 16a.

its condemnation power simply because use of the property it seeks to acquire might be available pursuant to Section 402(a). The legislative history is equally devoid of language prohibiting Amtrak's reconveyance of condemned property.

Accordingly, the court below erred in failing to recognize that neither Section 402(d) nor its legislative history indicates that Congress has "directly spoken to the precise question[s]" of either mandatory election of Section 402(a) remedies in a case of this kind, or limitations on the scope of the property interest Amtrak may condemn. The statute, and its legislative history, are *silent* as to these limitations on Amtrak's Section 402(d) powers. This plain error had significant consequences for the court's ultimate decision because "if the statute is silent . . . with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843 (footnotes omitted).[11]

The Commission applied Section 402(d) as written—*i.e.*, without inferring limits on Amtrak's condemnation power which the statute, on its face, does not impose. Having found that Amtrak and B&M were "unable to agree" within the meaning of the statute, the Commission read the statute to require its approval of the condemnation, absent affirmative findings under *both* Sections 402(d)(1)(A) and 402(d)(1)(B). 4 I.C.C.2d at 772. App. 45a. The Commission found that the trackage rights condition it imposed upon the condemnation protected B&M's ability to fulfill

---

[11] *Accord Immigration and Naturalization Service v. Cardoza-Fonseca*, 480 U.S. 421, 454 (1987) (Scalia, J., concurring in the judgment) ("This Court has consistently interpreted *Chevron*—which has been an extremely important and frequently cited opinion, not only in this Court but in the Courts of Appeals—as holding that courts must give effect to a reasonable agency interpretation of a statute unless that interpretation is inconsistent with a clearly expressed congressional intent." (Citations omitted.)).

its common carrier obligations on a continuing basis, and that none of the alternative rail routes it considered would adequately meet Amtrak's requirements for reestablishing and perpetuating its *Montrealer* service. *Id.* at 772-73. App. 45a-46a. This plainly plausible and, indeed, clearly correct interpretation of the statute was entitled to deference by the court below, as mandated by *Chevron*.[12]

Chevron and its progeny establish a clear analytical framework to guide the appellate courts in balancing their obligation to apply statutes as they are written by Congress with their limited role in reviewing agency decision-making. The result reached by the majority below threatens that framework and, absent intervention by this Court, invites other courts to likewise substitute their judgments for those of the agencies to which Congress has assigned responsibility for interpreting the statutes they administer.

That the court below avoided the proper application of *Chevron*'s initial analytical step—*i.e.*, determining whether Congress has "directly spoken to the precise question[s] at issue"—is apparent from the asserted bases for the court's finding that Section 402(d) is "unambiguous". In establishing limitations upon Amtrak's condemnation power

---

[12] The manifestly "permissible" character of the Commission's construction of the statute is confirmed by reference to explicit language in the legislative history of Section 402(d), which the court below simply ignored:

> Amtrak's need for the property would be deemed to be established, and the Commission would be required to order the conveyance, unless it found that such conveyance would significantly impair the ability of the railroad to carry out its obligations as a common carrier *and* that Amtrak's obligations to provide rail passenger service could be met by the acquisition of alternative property[.]

Conf. Rep. No. 587, 93d Cong., 1st Sess. 4 (1973), *reprinted in* 1973 U.S. Code Cong. & Admin. News at 2338 (emphasis added).

which the statute does not mention, the court relied on: (1) incomplete citations to the legislative history; (2) importation of Congressional policies against "cross-subsidization" gleaned from statutes other than the RPSA; (3) the "structure" of Section 402 as a whole; and (4) concerns as to the constitutionality of Section 402(d) as interpreted by the Commission.[13]

If the language of Section 402(d) unambiguously compelled the result announced by the majority, the resort to bases so far removed from the actual words used by Congress would hardly be necessary. More importantly, if the jurisprudence of *Chevron* and its progeny is to survive, this Court cannot condone the effort of the court below to avoid the result dictated by the rules established therein. Issuance of a writ of certiorari is clearly warranted to preserve the viability of those important rules.

III. THE DECISION BELOW DIRECTLY CONFLICTS WITH A DECISION OF THE SECOND CIRCUIT INVOLVING A PARALLEL STATUTE GOVERNING AMTRAK'S DELEGATED CONDEMNATION POWER

The decision of the panel majority cannot be reconciled with the decision of the Court of Appeals in *National Railroad Passenger Corp. v. Two Parcels of Land*, 822 F.2d 1261 (2d Cir.), *cert. denied*, 484 U.S. 954 (1987) ("*Two Parcels*"). In *Two Parcels*, Amtrak sought to condemn private property adjacent to its rail lines in New London, Connecticut, pursuant to a prior agreement with the City of New London providing that Amtrak would convey fee title to the condemned property to the City, while retaining a permanent easement allowing Amtrak access to the railroad right-of-way and its tracks over a service road the City would construct on the property. 822 F.2d at 1262-63. This condemnation was sought under Section 305(d) of the RPSA, 45 U.S.C. § 545(d) (App. 136a-138a), which authorizes Amtrak's condemnation of private *non-rail* property by means of application to the appropriate federal district court, when such property is "required [for] intercity rail passenger service." 45 U.S.C. § 545(d)(1)(B). App. 136a.

Section 305(d) and Section 402(d) are parallel condemnation statutes. They were enacted together in the Amtrak Improvement Act of 1973, Pub. L. No. 93-146, 87 Stat. 548, and their post-enactment treatment by Congress provides compelling evidence that they should be construed *in pari materia*.[14]

In *Two Parcels*, the landowner challenged Amtrak's condemnation on the grounds that "since Amtrak sought to condemn his land for the purpose of conveying it to New London for the latter's use as a public street, it exceeded its [statutory] power of eminent domain[.]" 822 F.2d at 1263. Recognizing that Amtrak's delegated condemnation power is less sweeping than the government's sovereign power of eminent domain, the Second Circuit nevertheless found the taking and reconveyance involved to be consistent with Amtrak's statutory authority, as well as its overall statutory purposes under the RPSA:

---

[13] The majority below illogically concluded that because of the *absence* of a clear statement from Congress that Section 402(d) allows Amtrak to reconvey condemned property, the court's doubts as to the constitutionality of the statute as interpreted by the Commission supported the court's view that the statutory language is "unambiguous". 911 F.2d at 752. App. 21a. Incredibly, when Congress obliged the court below with a "clearer statement" by amending Section 402(d), the court refused to apply it.

[14] Illustrative is the legislative history of §§ 706(f) and (g) of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31, 125, which amended both Section 305(d)(1)(B) and Section 402(d)(1) of the RPSA to clarify that Amtrak may condemn property under those statutes "whether or not construction of new tracks and facilities is involved." *See* S. Rep. No. 499, 94th Cong., 1st Sess. 104, *reprinted in* 1976 U.S. Code Cong. & Admin. News 14, 119-20.

> [W]e are persuaded that Amtrak did not exceed its statutory authority in the instant case. In addition to authorizing Amtrak to acquire land by eminent domain which is "required [for] intercity rail passenger service," 45 U.S.C. § 545(d)(1)(B) (1982), Congress has established a number of goals for Amtrak, including the "[e]xercise of [Amtrak's] best business judgment in taking actions to minimize Federal subsidies," 45 U.S.C. § 501a(1) (1982), and "[e]ncouragement of State, regional, and local governments and the private sector to share the costs of operating rail passenger service, including the costs of operating stations and other facilities, in order to minimize Federal subsidies," 45 U.S.C. § 501a(2) (1982).

822 F.2d at 1265.

The overarching Congressional policy objectives considered by the Second Circuit in evaluating the scope of Amtrak's Section 305(d) powers are equally pertinent in considering a condemnation under Section 402(d). Moreover, the factual similarities between the condemnation/reconveyance transaction approved in *Two Parcels* and the condemnation/reconveyance transaction voided by the court below in the case at bar are readily apparent. Just as Amtrak's need for a service road adjacent to its track in *Two Parcels* was "unchallenged", so too the court below found in this case that "use of B&M's line was obviously needed for the Washington-Montreal run[.]" 911 F.2d at 750. App. 18a.[15] In *Two Parcels*, Amtrak could have resorted to condemnation of a mere easement over the landowner's property under Section 305(d), instead of taking the entire fee, and built and maintained its own service road thereon. Yet the Second Circuit deferred to Amtrak's judgment that condemnation of the fee, and reconveyance thereof to the City, was the best means of fostering rail passenger service while, at the same time, serving the Congressional objectives of encouraging cooperation with appropriate local governmental interests and private parties so as to minimize the cost to the federal government of providing such service.

[15] In denying rehearing, the court below states that in *Two Parcels* "Amtrak acquired through condemnation a property right it did not previously enjoy" and that this "new property interest was unquestionably 'required [for] intercity rail passenger service[.]' " Order at 2. App. 2a. Those observations provide no basis for distinguishing *Two Parcels*. Here, prior to its Section 402(d) action, Amtrak had no contractual right to operate on B&M's Connecticut River Line, because in 1987, B&M unilaterally cancelled its Operating Agreement with Amtrak. Thus, in *both* cases, Amtrak was required to take some action in order to acquire a property interest needed in connection with its statutory obligation to provide rail passenger service.

The attempt of the court below, in denying rehearing, to sidestep *Two Parcels* is unpersuasive. Amtrak's "need" to acquire an interest in private property for purposes of providing rail passenger service is apparent in each case; the issue is whether Amtrak can (as the Second Circuit held in *Two Parcels*), or cannot (as held by the court below), condemn an interest in property required for rail passenger service greater than that which it intends to retain. A writ of certiorari should issue to allow this Court to resolve this important and fundamental conflict.

IV. IMPORTANT POLICIES AND OBJECTIVES OF THE RAIL PASSENGER SERVICE ACT WILL BE FRUSTRATED IF AMTRAK IS DEPRIVED OF ITS CONDEMNATION POWER PURSUANT TO THE DECISION BELOW

Through enactment of the RPSA in 1970, Congress created Amtrak and entrusted to it the task of reviving and maintaining a comprehensive system of modern, efficient and cost-effective intercity rail passenger service on a nationwide basis. *See generally National Railroad Passenger*

Corp. v. Atchison, Topeka & Santa Fe Ry. Co., 470 U.S. 451, 454-55 (1985); *City of Philadelphia v. Baker*, 508 F.2d 279, 282 (3d Cir.), *cert. denied*, 422 U.S. 1042 (1975). Since Amtrak's creation, Congress has repeatedly acted to ensure that Amtrak has the necessary tools to accomplish its objectives at the least possible cost to the federal government and, ultimately, federal taxpayers. *See generally* 45 U.S.C. § 501a(1), (2) (Congress requires Amtrak to take actions to minimize federal subsidies, including cooperative arrangements with local government and private sector); *Two Parcels*, 822 F.2d at 1265.

Outside the Northeast Corridor, the preponderance of Amtrak's nationwide rail passenger service is rendered over trackage owned and maintained by freight railroads, and Amtrak has no alternative to the use of those rail lines. In recognition of these circumstances, Congress has established in Section 402 of the RPSA a spectrum of remedies designed to enable Amtrak to fulfill its objectives, providing that:

- Amtrak can obtain long-term trackage rights and usage of other facilities of another railroad upon terms and conditions established by the Commission;
- Amtrak may obtain trackage rights and usage of other facilities of another railroad to meet needs dictated by an emergency;
- Amtrak may condemn another railroad's property;
- Amtrak's passenger trains are accorded a preference over freight trains operating over the same rail lines; and
- Other railroads may be compelled to permit Amtrak passenger trains operating over their lines to operate at accelerated speeds.

See 45 U.S.C. §§ 562(a), (c)-(f). App. 139a-143a.

The powers these provisions confer upon Amtrak have been crucial to its establishment of sound and cooperative business relationships with freight railroads. Absent its Section 402 powers, Amtrak could obtain only such rights as the owning railroad would willingly allow, and only at such charges as the owning railroad dictated. Amtrak's viability as a corporation charged with fulfilling the Congressional mandate to efficiently provide high quality intercity rail passenger service largely depends on its extraordinary arsenal of legal rights. The perceived certainty of the remedies available to Amtrak if the parties are unable to reach agreement has contributed importantly to the stability of Amtrak's relationships with other railroads. The uncertainty caused by the erroneous interpretation and application of a key provision of Section 402 by the court below can be expected to seriously undermine Amtrak's dealings with the railroad industry.

The Section 402(d) condemnation power guarantees that Amtrak will not be foreclosed from fulfilling its statutory mandate when a recalcitrant railroad refuses to provide Amtrak with property it requires for that purpose. At the same time, the legitimate interests of the owning railroad are fully protected because: (1) the Commission has authority, pursuant to subparts 402(d)(1)(A) and 402(d)(1)(B), to deny the condemnation where Amtrak fails to establish its "need" for the property; (2) the condemnee railroad is made whole by payment of just compensation and through such conditions on the condemnation as the Commission finds warranted; (3) subsequent conveyances of condemned property to another carrier are overseen by the Commission; and (4) Congress has an extensive continuing oversight role with respect to Amtrak.

In this case, the court below impermissibly circumscribed Amtrak's authority under Section 402(d) by interpreting the statute so as to (i) require Amtrak to seek trackage rights under Section 402(a), instead of condemnation, even though Amtrak determined that trackage rights would not

suffice to meet its long-term needs, and (ii) limit Amtrak's condemnation power to only those interests in property that it intended to retain. Under the court's decision, uncooperative freight railroads are now presumably free to "hold up" Amtrak in situations where, as with the Connecticut River Line, trackage rights alone are inadequate to meet Amtrak's needs to ensure the restoration and maintenance of efficient and reliable service. This is the very scenario Section 402(d) was enacted to prevent.[16] A writ of certiorari should issue to permit this Court to reestablish the viability of Amtrak's condemnation power.

CONCLUSION

For these reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

BASIL COLE
ROBERT P. VOM EIGEN,
Counsel of Record
CHARLES I. APPLER
THEODORE A. HOWARD
RICHARD F. RILEY, JR.

HOPKINS & SUTTER
888 Sixteenth Street, N.W.
Washington, D.C. 20006
(202) 835-8000

Counsel for Petitioners

OF COUNSEL:

STEPHEN C. ROGERS
FREDERICK C. OHLY

NATIONAL RAILROAD
PASSENGER CORPORATION
60 Massachusetts Avenue, N.E.
Washington, D.C. 20002
(202) 906-3985

DATED: March 11, 1991

---

[16] Ironically, the majority below noted as much. *See* 911 F.2d at 749 (purpose of Section 402(d) "was to assure [Amtrak] the ability to acquire properties it needed for its intercity passenger service free of extortion"). App. 16a.

APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Filed February 1, 1991

No. 88-1631

BOSTON AND MAINE CORPORATION, PETITIONER

v.

INTERSTATE COMMERCE COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

WINDSOR MINERALS, INC., *et al.*, INTERVENORS

and consolidated case Nos. 88-1728, 88-1731 & 88-1732

On Petitions for Rehearing

Before RUTH B. GINSBURG, BUCKLEY, and SENTELLE, *Circuit Judges*.

ORDER

Upon consideration of the petitions for rehearing filed by respondents and intervenors, the supplements thereto,

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

and petitioner's opposition, it is hereby ORDERED by the court that the petitions for rehearing be and hereby are denied.

In support of their petitions, respondents and intervenors argue, *inter alia*, that the court's opinion is in conflict with *National R.R. Passenger Corp. v. Two Parcels of Land*, 822 F.2d 1261 (2d Cir.), *cert. denied*, 484 U.S. 954 (1987), and that Congress's supervening enactment of the Independent Safety Board Act Amendments of 1990, Pub. L. No. 101-641, 104 Stat. 4654 (1990), compels a rehearing. We disagree.

In *Two Parcels*, Amtrak acquired through condemnation a property right it did not previously enjoy, namely, a permanent easement for right of way on an adjacent service road. The acquisition of that new property interest was unquestionably "required [for] intercity rail passenger service" because Amtrak's need for the new service road for inspection and maintenance purposes was "unchallenged" and demonstrated a "significant relationship" between the condemnation and the provision of passenger service. 822 F.2d at 1265. Moreover, the Second Circuit was construing section 305(d)(1)(B) of RPSA, under which Amtrak is authorized to condemn property not owned by a railroad. 45 U.S.C. § 545(d)(1)(B). In contrast, section 402 governs Amtrak's authority to secure the use of tracks and other rail facilities owned or operated by the nation's railroads, and subsections (a) and (d) establish an interplay between Amtrak's ability to acquire trackage rights and its power to take a property interest in rail facilities when required for passenger service. *See* 45 U.S.C. § 562(a), (d). Amtrak's claim that it may resort to section 402(d) to effect a transfer between competing railroads of a line over which it already has trackage rights implicates questions of statutory construction and congressional intent, including Congress's policy against cross-subsidization within the rail industry, *see* 911 F.2d at 752-53, not germane to section 305.

Section 9 of the Independent Safety Board Act Amendments added the following language to the end of section 402(d)(1) of RPSA:

> The Corporation [Amtrak] may subsequently convey title or other interest in such property to a third party, if such reconveyance is found by the Commission to further the purposes of this Act.

Pub. L. No. 101-641, § 9(a), 104 Stat. at _ (amending 45 U.S.C. § 562(d)(1)). This amendment was specifically made applicable to any prior or pending case, including the present one. *Id.* § 9(b).

The new language plainly authorizes Amtrak to convey property *subsequent to* a condemnation that is otherwise valid under section 402(d)(1). It does not affect the requirement that the property that is subsequently conveyed may not be condemned in the first place if it is not "required for intercity rail passenger service." The court construed section 402 to preclude Amtrak from resorting to its subsection (d) power to effect an outright change in ownership between competing railroads if it could instead achieve the objective necessary for passenger service by taking a lesser interest or by using its subsection (a) power. The court also concluded that the I.C.C. had not made adequate findings pursuant to subparagraphs (A) and (B) and thus had not properly determined that the condemnation of the Connecticut River Line was required for Amtrak's services. These conclusions are not disturbed by the statutory amendment.

PER CURIAM*

For the Court:

CONSTANCE L. DUPRÉ, Clerk

---

*Because she did not join in the majority's interpretation of 45 U.S.C. § 562(a), (d), Judge Ruth B. Ginsburg neither joins in nor dissents from the court's order. Her separate statement is appended hereto.

Statement by Circuit Judge RUTH B. GINSBURG *regarding the petitions for rehearing*: Section 9 of the Independent Safety Board Act Amendments of 1990, Pub. L. No. 101-641, 104 Stat. 4654 (1990), coincides with my view that the Interstate Commerce Commission (ICC) plausibly interpreted section 402, 45 U.S.C. § 562 (1982). Furthermore, current Supreme Court precedent, as I comprehend it, does not cast constitutional doubt on the legislature's measure. *See Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 241 (1984) ("where the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause"). I remain of the view, however, that the Commission *itself* has not yet stated, with supporting findings, that the picture of an intransigent Boston and Maine Railroad drawn by Amtrak is in fact accurate. *See Boston & Maine Corp. v. ICC*, 911 F.2d 743, 754-55 (D.C. Cir. 1990) (concurring opinion). I would therefore remand this matter to the ICC for a clear and satisfactorily reasoned statement of its decision.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued January 18, 1990 Decided August 10, 1990

No. 88-1631

BOSTON AND MAINE CORPORATION, PETITIONER

v.

INTERSTATE COMMERCE COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

WINDSOR MINERALS, INC.,
STATE OF VERMONT,
NATIONAL RAILROAD PASSENGER CORP.,
CENTRAL VERMONT RAILWAY, INC.,
COMMONWEALTH OF MASSACHUSETTS,
INTERVENORS

and consolidated case Nos. 88-1728, 88-1731 & 88-1732

Petitions for Review of Orders of
the Interstate Commerce Commission

Eric L. Hirschhorn, with whom *William D. Coston*, *Frederick J. Killion*, and *Arlene Pianko Groner* were on the

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

brief, for Boston and Maine Corp., petitioner in No. 88-1631. *Richard K. Walker* also entered an appearance for Boston and Maine Corp.

Michael F. McBride, with whom *Paul H. Falon* and *Judith L. Truax* were on the brief, for the Commonwealth of Massachusetts, petitioner in No. 88-1732 and intervenor in No. 88-1631.

Charles I. Appler, with whom *Basil Cole*, *Robert P. vom Eigen*, *Richard F. Riley, Jr.*, and *Frederick C. Ohly* were on the brief, for National Railroad Passenger Corp. and Central Vermont Railway, Inc., petitioners in No. 88-1731 and intervenors in Nos. 88-1631, 88-1728 and 88-1732.

Charles H. White, Jr. and *John T. Sullivan* were on the brief for Canadian Pacific, Ltd., petitioner in No. 88-1728.

Louis Mackall, Attorney, Interstate Commerce Commission ("ICC"), with whom *Robert S. Burk*, General Counsel, ICC, *James F. Rill*, Assistant Attorney General, *Catherine G. O'Sullivan*, and *John P. Fonte*, Attorneys, Department of Justice, were on the joint brief, for respondents.

G. Paul Moates, *Ronald S. Flagg*, and *Terence M. Hynes* were on the brief for intervenor State of Vermont.

Daniel J. Sweeney and *John M. Cutler, Jr.* were on the brief for intervenor Windsor Minerals, Inc., in No. 88-1631.

William G. Mahoney and *John O'B. Clarke, Jr.* were on the brief for intervenor Railway Labor Executives' Ass'n in No. 88-1731.

Before RUTH B. GINSBURG, BUCKLEY, and SENTELLE, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* BUCKLEY.

Concurring opinion filed by *Circuit Judge* RUTH B. GINSBURG.

BUCKLEY, *Circuit Judge*: The action here under review is the Interstate Commerce Commission's approval of the National Railroad Passenger Corporation's request for the

condemnation of 48.8 miles of Boston & Maine railroad track and attached property, which it immediately reconveyed to the Central Vermont Railroad. Because we find that the use of its condemnation power to force the conveyance of property from one private owner to another exceeded the Commission's authority under the Rail Passenger Service Act, we grant the petition for review and vacate the Commission's orders.

I. BACKGROUND

A. Statutory Background

In 1970, Congress responded to deteriorating rail conditions and passenger service by passing the Rail Passenger Service Act of 1970, Pub. L. No. 91-518, 84 Stat. 1328 (1970) ("RPSA" or "Act"). The Act provided for the creation of the National Railroad Passenger Corporation ("Amtrak") and set out various goals and guidelines for it to follow in reinvigorating intercity rail service. Section 402(a) of the Act provides, in relevant part, as follows:

> (a) [Amtrak] may contract with railroads . . . for the use of tracks and other facilities and the provision of services on such terms and conditions as the parties may agree . . . . In the event of a failure to agree, the Interstate Commerce Commission shall, . . . if it finds that doing so is necessary to carry out the purposes of this chapter, order the provision of services or the use of tracks or facilities of the railroad by [Amtrak], on such terms and for such compensation as the Commission may fix as just and reasonable, and the rights of [Amtrak] . . . shall be conditioned upon payment by [Amtrak] of the compensation fixed by the Commission.

45 U.S.C. § 562(a) (1982). Section 402(a) by its terms governs situations where Amtrak is seeking the *use* of tracks ("trackage rights"), facilities, or services owned or provided by a particular railroad.

After passage of the RPSA, it became apparent that Amtrak was often unable to lease or purchase, on reason-

able terms, properties that were required for its intercity passenger service. In response to this concern, among others, Congress passed the Amtrak Improvement Act of 1973, Pub. L. No. 93-146, 87 Stat. 552 (1973). The 1973 Act, *inter alia*, added subsection (d) to section 402 of the RPSA, which provides in pertinent part as follows:

> (d)(1) If [Amtrak] and a railroad are unable to agree upon terms for the sale to [Amtrak] of property (including interests in property) owned by the railroad and required for intercity rail passenger service, [Amtrak] may apply to the Commission for an order establishing the need of [Amtrak] for the property at issue and requiring the conveyance thereof from the railroad to [Amtrak] on reasonable terms and conditions, including just compensation. Unless the Commission finds that—
>
> (A) conveyance of the property to [Amtrak] would significantly impair the ability of the railroad to carry out its obligations as a common carrier; and
>
> (B) the obligations of [Amtrak] . . . can adequately be met by the acquisition of alternative property (including interests in property) which is available for sale on reasonable terms to [Amtrak] . . .
>
> the need of [Amtrak] for the property shall be deemed to be established and the Commission shall order the conveyance of the property to [Amtrak] on such reasonable terms and conditions as it may prescribe, including just compensation.

45 U.S.C. § 562(d)(1) (1982). Section 402(d) by its terms governs the case where Amtrak seeks the *conveyance* of a railroad's property to itself.

B. Factual and Procedural Background

This case involves four consolidated petitions for review of orders of the Interstate Commerce Commission. The central participants are Amtrak, the Boston and Maine Railroad ("B&M"), and Central Vermont Railroad, the wholly owned subsidiary of Canadian National Railway Company, one of Canada's two transcontinental railroads.

The Connecticut River Line is a rail line running between Springfield, Massachusetts and White River Junction, Vermont. Prior to the transaction at issue here, B&M owned large stretches of the Connecticut River Line, while Central Vermont owned the remainder. B&M and Central Vermont have been longtime competitors in the freight rail business along the Connecticut Valley. Pursuant to a 1930 trackage agreement between the two, each had the right to operate over the other's rails. At White River Junction, the line splits into a westerly and an easterly fork. The westerly fork is owned by Central Vermont/Canadian National and continues up to St. Albans, Vermont, across the border into Canada, and on to Montreal. The easterly fork, owned by B&M, links up at the Canadian border with tracks of Canadian Pacific, Ltd., Canada's other transcontinental railroad. B&M track also splits off of this fork to serve Berlin and other towns in New Hampshire. At issue in this case is a 49-mile B&M-owned segment and associated facilities between Windsor and Brattleboro, Vermont (collectively, the "B&M segment").

Commencing in 1972, in response to a congressional determination that such service was in the public interest, Amtrak began running its "Montrealer" passenger train from Washington, D.C. through the Connecticut Valley to Montreal. The service was discontinued on April 5, 1987. Amtrak maintained before the ICC and maintains in these petitions that the discontinuation resulted directly from the poor condition of the B&M-owned tracks over which the Montrealer had to run. Amtrak alleged that B&M's failure to maintain the tracks in a condition that would permit passenger train service at 60 miles per hour ("mph") was a violation of a 1977 contract between Amtrak and B&M. B&M responded that that contract had expired and that it had no obligation other than to maintain the tracks in a condition capable of bearing its own 25 mph freight traffic. Although Amtrak maintains that B&M had stated unequivocally that it did not intend to upgrade the tracks and was considering abandonment

of the line, B&M insists that it was ready to cooperate in the project to upgrade the tracks, provided that Amtrak agreed to pay for its share of the costs. B&M states that the incremental cost of maintaining tracks suitable for trains traveling at 60 mph as opposed to 25 mph would be $400,000 per year and asserts that it was Amtrak's statutory responsibility to bear this cost.

When Amtrak became convinced that B&M was not going to upgrade the tracks, it began discussions with Central Vermont. As Amtrak did not wish to own and apparently could not afford to purchase the B&M segment, an arrangement was worked out whereby Amtrak agreed to use its powers of eminent domain under section 402(d) to effect the transfer of the property to Central Vermont. As described in an internal Central Vermont memorandum, this plan called for Amtrak to make an offer of one million dollars for the B&M segment. If B&M did not accept the offer—and the memorandum noted "we have reason to believe [B&M] will not accept it"—then Amtrak would take the B&M segment by eminent domain and reconvey it to Central Vermont. Memorandum from R. Lawless to G. Maas (Jan. 6, 1988), *reprinted in* B&M Brief at 67a-69a. In pursuit of this plan, on March 18, 1988, Amtrak and Central Vermont entered into three contracts dealing, respectively, with the acquisition of the B&M segment ("Acquisition Agreement"), the repair and rehabilitation of the segment after its acquisition ("Rehabilitation Agreement"), and operations over the property ("Operating Agreement").

Under the Acquisition Agreement, Deferred Appendix ("DA") at 225-38, Amtrak undertook to make the million dollar offer to B&M subject to the terms specified therein. DA at 231. Central Vermont agreed to provide Amtrak with the funds required to make the purchase in the event B&M accepted the offer. If B&M did not accept, Amtrak would file a section 402(d) application to acquire the property by eminent domain. *Id.* at 232. The agreement also provided that B&M would be allowed to retain the exclusive right to serve existing customers along the stretch of

track it formerly owned so long as "B&M maintains its service at levels to be specified in the trackage rights agreement." *Id.* at 230. Central Vermont, however, would have the exclusive right to serve new facilities and shippers coming into existence on the line after its conveyance to Central Vermont. *Id.*

Under the Rehabilitation Agreement, DA at 239-57, Central Vermont undertook to rehabilitate the B&M segment to standards specified by Amtrak for payments which "will in no event exceed $3.1 million." DA at 241-42. Presumably, these payments would come out of a $5 million grant that Congress had appropriated for the restoration of the Montrealer service. The Operating Agreement, DA at 258-88, which was in the form of an amendment to a 1978 contract between the two companies, required Central Vermont to maintain the B&M segment in accordance with the provisions of the earlier agreement and limited Amtrak's right to use the line to twenty years. DA at 261.

As required by the Acquisition Agreement, on March 18, 1988, Amtrak mailed a letter to B&M offering to purchase the segment for one million dollars on a fourteen-day "take-or-leave" basis. In its reply, B&M reaffirmed its continued readiness to negotiate the terms of compensation to be paid by Amtrak, expressed its willingness to submit the apportionment of the additional expenses to a third party such as the ICC, and concluded that "[i]n light of the above, it appears clear that there is no need to pursue the very complex 'offer to purchase' set forth in [Central Vermont's] letter, nor to comment in detail on the inapplicability of Section 562(d) to this situation." Letter from D. Fink to D. Sullivan (Mar. 29, 1988), *reprinted in* B&M Brief at 73a. Amtrak treated this letter as a rejection, and proceeded promptly with condemnation proceedings under section 402(d).

On April 26, 1988, the Commission issued the first of its orders, which found that Amtrak had been unable to reach agreement with B&M on the upgrading of the line.

National Railroad Passenger Corp., Finance Docket No. 31250, at 7 (Apr. 26, 1988). A series of procedural decisions followed, with B&M losing its bid to convert the proceeding into one under section 402(a) for a setting of reasonable rates by the Commission and the granting of trackage rights, as opposed to condemnation. Finally, on August 4, 1988, the Commission issued its major decision, *National Railroad Passenger Corp.—Conveyance of B&M Corp. Interests in Connecticut River Line in Vermont and New Hampshire*, 4 I.C.C.2d 761 (1988) ("Final Decision").

In its Final Decision the Commission found that there had been a failure to agree within the meaning of section 402(d), thus entitling Amtrak to a Commission determination on condemnation. *Id.* at 768-69. The ICC rejected B&M's argument that section 402(a) required that Amtrak first move for a conveyance of track rights; rather, it saw the statute as providing Amtrak with an election of remedies, *id.* at 770, and concluded that Amtrak had met the requirements of section 402(d) and was therefore entitled to condemnation. *Id.* at 769-71.

The Commission noted that it was without authority to pass on the constitutionality of an Act of Congress, *id.* at 771, and thus specifically refused to consider B&M's constitutional argument that if section 402(d) allowed this taking, it violated the public use requirement of the Fifth Amendment's takings clause. The ICC stated in dicta, however, that it would have found this conveyance to be for a public use. *Id.* at 771-72. Moving on to the issue of just compensation, the ICC fixed it at the higher of net liquidation value and going concern value, in this case $2,373,286. *Id.* at 780-81, 791. The Commission then exempted the transfer to Central Vermont from the competition scrutiny and formal approval otherwise mandated by 49 U.S.C. §§ 11343-11345 (1982), rejecting B&M's and Canadian Pacific's contention that the conveyance would greatly diminish rail competition in the area. *Id.* at 798-801.

Commission Chairman Gradison strongly dissented from the majority's conclusion. While acknowledging that

Amtrak would have been entitled to an order conveying that portion of the B&M property which Amtrak "wanted and needed for intercity rail passenger service," Chairman Gradison believed the statute did not permit Amtrak "to restructure as between private, competing rail common carriers of freight that part of the ownership of the Conn River Line which it has admitted it does not need and does not want." 4 I.C.C.2d at 808-09.

Pursuant to the Commission's orders, the line was conveyed to Amtrak, which immediately reconveyed it to Central Vermont. Central Vermont completed an upgrading of the track using the funds granted Amtrak by Congress, and, in July 1989, the Montrealer service was reinstituted.

There are four consolidated petitions for review before the court. The first and central petition is that of B&M, No. 88-1631, which protests the approval of the forced conveyance on both statutory and constitutional grounds and objects to the way in which the just compensation figure was derived. Next, in No. 88-1728, Canadian Pacific, which is Canadian National's large rival, argues that the transfer will adversely affect competition in the rail service market. In No. 88-1731, Amtrak and Central Vermont take issue with the valuation procedure, asserting that the Commission's figure was too high. Finally, in No. 88-1732, the Commonwealth of Massachusetts objects to the Commission's failure to ensure that Amtrak retained the right to use the B&M segment for passenger service in perpetuity and raises two additional issues which, at oral argument, it agreed were either moot or not ripe for judicial review. In addition, intervenor Railway Labor Executives' Association asks that if we vacate the ICC's order, in whole or in part, we also include in any remand order a requirement that the Commission protect the interests of employees who transferred employment from B&M to Central Vermont in reliance on the ICC's decision. Because we find that the forced conveyance exceeded the ICC's authority and vacate the Commission's order approving such transfer, we need not address any of the

questions presented in the other petitions. We leave the issue of appropriate new protective arrangements for employees to the Commission in the first instance.

II. Discussion

B&M argues that in enacting the RPSA, Congress did not intend that Amtrak be able to invoke the section 402(d) condemnation power as a means of securing the use of tracks belonging to another carrier; instead, Congress established section 402(a) as the means by which Amtrak could secure trackage rights necessary to its operations in cases where the parties proved unable to agree on the terms and conditions of such use. In such cases, the Commission is authorized by subsection (a) to order that Amtrak be authorized to use the tracks "on such terms and for such compensation as the Commission may fix as just and reasonable." B&M argues that that compensation must cover at least the "incremental cost" of the use of the tracks because section 402(a) specifically provides that

> the Commission shall, in fixing compensation in excess of incremental costs, consider quality of service as a major factor in determining the amount (if any) of such compensation.

45 U.S.C. § 562(a). B&M maintains that if Amtrak had proceeded through section 402(a), it would have been required to reimburse B&M for incremental costs attributable to Amtrak's need for 60 mph passenger service, which it estimates at $400,000 a year. B&M argues that Amtrak was essentially calling on B&M to subsidize Amtrak's passenger service because B&M was being asked to pay for a good (60 mph capacity) that was only of value to Amtrak.

B&M also asserts that such a request runs counter to congressional policy against cross-subsidization and other inefficiencies in the rail industry. *See General Am. Transp. Co. v. ICC*, 872 F.2d 1048, 1054-55 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 1112 (1990). B&M argues that it would

be contrary to this policy and to the sense of the statute to interpret section 402(d) to let Amtrak do by condemnation what it cannot do under section 402(a); in fact, to allow Amtrak to find another railroad willing to offer the same service for less money, then condemn the property and transfer it to the lower bidder, would be to authorize bidding wars for Amtrak's condemnation privileges.

The Commission responds that the Act contains no provision that requires Amtrak to exhaust its remedies under section 402(a) before proceeding to section 402(d). It maintains that under the statutory scheme, Amtrak has a choice of remedies, and as long as it meets the literal requirements of section 402(d), it is entitled to a decision from the Commission on condemnation. The Commission did concede that the use of the section 402(d) proceeding was extraordinary—the first time, in fact, that it has ever been used. But the Commission defends the resort to condemnation as essential to what it candidly describes as an "imaginative financing device," namely, Amtrak's acquisition of title from B&M so that it might enter into a sale and lease-back transaction with Central Vermont on terms more advantageous than those available from B&M. As the Commission points out, this is "a well-recognized means of raising capital by selling an asset while still retaining the use of it." ICC Brief at 24.

We believe this last argument places the issue in proper focus. B&M does not dispute Amtrak's right to a condemnation determination on property that Amtrak claims it needs and wishes to acquire for itself. The issue, rather, is whether Amtrak has the authority to use section 402(d) to effect a change in ownership of rail lines between other parties. For the reasons discussed below, we conclude that the Act does not permit Amtrak to take property by eminent domain for which it concededly has no need itself merely because there is another private party that would like to have it and will pay Amtrak for the privilege of having it condemned.

As an initial observation, we note that although an agency interpretation of a statute committed to its

administration is entitled to deference, it is nonetheless well settled that "[i]f a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Chevron U.S.A. Inc. v. NRDC, Inc.*, 467 U.S. 837, 843 n.9 (1984). Those tools of statutory construction include not only the wording of the statute but, where appropriate, an analysis of its legislative history and structure as well. *See K Mart Corp. v. Cartier, Inc.*, 108 S. Ct. 1811, 1817 (1988) (in ascertaining plain meaning of a statute, court must look to language at issue as well as to the language and design of the statute as a whole); *Thompson v. Thompson*, 108 S. Ct. 513, 516 (1988) (congressional intent to create implied right of action turns on inferences from language, statutory structure, and legislative history).

On examining the language and history of subsection (d) and the structure of section 402, we conclude that its meaning is unambiguous. We begin with an examination of the meaning of the subsection's language, as reinforced by its history.

A. The Language and History of Subsection (d)

Congress added subsection (d) to section 402 three years after the enactment of section 402(a). In explaining the purpose of the proposed subsection, which the House would later adopt, the Senate Report noted:

> At the present time [Amtrak] leases terminal and other facilities from various railroads. These facilities are not always best adapted to Amtrak's needs, nor is a lease always the most economical means by which Amtrak could fulfill its requirements for a facility .... Because of the relatively inflexible site requirements of property [Amtrak] typically would want to acquire, Amtrak could be put in a very disadvantageous bargaining position. ... Giving [Amtrak] the power of eminent domain, coupled with the ability to seek conveyance of the property through the Commission under this section, will insure that Amtrak can

> acquire the property necessary to perform its public service mission at a reasonable price.

S. Rep. No. 226, 93d Cong., 1st Sess. 4 (1973), *reprinted in* 1973 U.S. Code Cong. & Admin. News 2324, 2326-27. Thus one purpose for providing Amtrak with the power of eminent domain was to assure it of the ability to acquire the properties it needed for its intercity passenger service free of extortion.

As would be expected from the congressional purpose outlined above, section 402(d) explicitly provides that if Amtrak and a railroad

> are unable to agree upon terms for the sale to [Amtrak] of property ... owned by the railroad and *required for intercity rail passenger service*, [Amtrak] may apply to the Commission for an order establishing the need of *[Amtrak]* for the property at issue and requiring conveyance thereof from the railroad *to [Amtrak]*.

45 U.S.C. § 562(d)(1) (emphases added). It is clear enough that the statute contemplates that the property acquired by condemnation must be required by Amtrak for *its* use, as it alone is engaged in intercity rail passenger service. Yet, in the case before us, it is evident that the conveyance to Amtrak was one in form only, a necessary formality in consummating a scheme whose purpose was to effect a transfer of B&M's property not to Amtrak, but to Central Vermont.

In sanctioning that scheme, the Commission ignores the principle that the condemnation power is to be strictly construed to encompass only what is conferred by statute. *See United States v. Carmack*, 329 U.S. 230, 243 n.13 (1946) (utility's condemnation power limited to those powers "expressed or necessarily implied"); Final Decision, 4 I.C.C.2d at 811 (Gradison, Ch., dissenting); *see also National R.R. Passenger Corp. v. Two Parcels of Land*, 822 F.2d 1261, 1264-65 & n.3 (2d Cir.) (holding Amtrak's condemnation power to be of the more limited statutory variety as opposed to the broader sovereign power of eminent

domain), *cert. denied,* 484 U.S. 954 (1987). First, the Commission's reading overlooks the limitation, already noted, that the property to be acquired must be for the use of Amtrak, and not one which, as here, Amtrak had no intention of retaining. As Chairman Gradison's dissent points out, the record is "shockingly clear" that Amtrak had neither the need nor the desire for the condemned interest. *Id.* at 809. The Chairman concluded, correctly, that section 402(d) does not permit Amtrak to secure the conveyance of an interest in property it does not need for its own use.

Second, even if the Commission were under no obligation to go beyond form to substance, its reading overlooks the requirement that the property taken must be one "required for intercity rail passenger service." While use of B&M's line was obviously needed for the Washington-Montreal run, Amtrak did not have to condemn the entire fee interest in the line in order to provide that service. Rather, what it required, and what in fact was all it sought in substance if not in form, was not title to the B&M segment but its use in a condition permitting resumption of the Montrealer service. As B&M points out, Amtrak could have commandeered that use under section 402(a), which authorizes the Commission to order the parties to enter into an appropriate trackage rights agreement.

B&M also argues that in the alternative, Amtrak could have invoked section 402(d) to secure an easement over the B&M segment, together with the right to improve and maintain the easement consistent with the granted use. It then reasons that as this lesser interest would meet Amtrak's needs, the condemnation of the greater interest was neither necessary nor permissible under the Act in light of the requirements of subsections 402(d)(1)(A) and (B).

These subsections require that if the requested condemnation is found to significantly impair the condemnee's "ability ... to carry out its obligations as a common

carrier," 45 U.S.C. § 562(d)(1)(A), Amtrak's need is presumed to be established *unless* the Commission *also* finds that that need can be adequately met "by the acquisition of alternative property *(including interests in property)* which is available for sale on reasonable terms to [Amtrak]." *Id.* § 562(d)(1)(B) (emphasis added). In this case, the property taken is the entire fee to a large stretch of a railroad's main line.

In light of B&M's explicit claim of significant impairment, DA 341-47, we could not uphold a Commission determination that dismisses the railroad's detailed exposition with the cursory statement that its ability to carry out its common carrier obligations will be adequately protected by the terms of a trackage rights agreement dictated by its competitor, Central Vermont. Final Decision at 773. The statute provides that the Commission's finding on impairment focus on the "conveyance of the property to [Amtrak]" and not on post-hoc remedies aimed at ameliorating the impairment that obviously would be caused by the conveyance of the entire fee interest in a railroad's main line.

Of course, even if there is impairment, the ICC must also find that Amtrak's need can be met by an alternative property before the presumption of need is disturbed. But here we find that the Commission has not seriously addressed B&M's argument that Amtrak's requirements could be met through the conveyance of a lesser interest. The Commission's Final Decision notes that

> B&M further argues that Amtrak could achieve its purposes under § 402(d) by acquiring an easement or trackage rights for passenger service without divesting B&M of ownership,

4 I.C.C.2d at 770, and dismisses the argument with the response that

> since § 402(a) provides for trackage rights, § 402(d) must have been intended to provide more. We find that Amtrak has demonstrated sufficient reason to justify acquisition of ownership of the line.

Id. By equating an easement in a rail line with trackage rights available under section 402(a), the Commission concludes that nothing less than the entire fee interest in a rail line may be condemned under section 402(d). The Commission thus reads the words "interest in property" out of the statute. As Amtrak was not seeking an easement, see Amtrak Application April 4, 1988, at 17, we need not decide whether section 402(d) contemplates the condemnation of such an interest. We do conclude, however, that the Commission failed to explain its decision adequately, as its rejection of B&M's "lesser interest" argument rested on the conclusory assertion that Amtrak has demonstrated sufficient reason to justify acquisition of the line.

The Commission readily acknowledges, in its brief, that rather than obtaining a property interest, Amtrak's real purpose was to secure the transfer of the trackage from B&M to Central Vermont. The ICC asserts on appeal that what was really "needed" here was a responsible owner for the B&M segment, one that could be counted on to maintain the tracks in a condition suitable for the Montrealer; as the only way to place the property in competent hands was for Amtrak to acquire it first and then reconvey it, the interim ownership of full title was necessary to its operations. ICC Brief at 24. The statute, however, is unambiguous in its provision that "the property at issue" is the proper focus of Amtrak's need, not the desirability of substituting one private owner for another.

Moreover, even assuming that the ICC's "responsible owner" rejoinder to B&M's "lesser interest" argument had merit, it emerges for the first time on appeal. The Commission's Final Decision makes no response to that argument other than the conclusory statement that Amtrak "has demonstrated sufficient reason to justify acquisition of ownership of the line." Final Decision at 770. This is not good enough. Although agency determinations are entitled to deference, "the agency must set forth the basis of [its] decision with such clarity as to be understandable. It will not do for a court to be compelled to guess at the

theory underlying the agency's action." *Tarpon Transmission Co. v. FERC*, 860 F.2d 439, 442 (D.C. Cir. 1988) (internal quotes omitted). In light of the statutory language limiting Amtrak's condemnation privileges to interests in property that are required for intercity rail passenger service, we find that the Commission's conclusory assertions fail the requirement of reasoned decisionmaking.

Finally, in light of the tremendous expansion of Amtrak's power that the Commission's reading of the statute would allow, we would expect to see a clearer statement from Congress that such was intended. Although we do not reach B&M's constitutional argument that the forced conveyance approved by the ICC violated the public use requirement of the Takings Clause, we note that there are at least colorable Fifth Amendment problems with the statute as interpreted by the Commission. The Supreme Court has approved takings of private property for reconveyance to third parties when such transfers were central to the public interest at stake, such as breaking up oligopolistic land ownership patterns, *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984), or slum clearance, *Berman v. Parker*, 348 U.S. 26 (1954). We are unaware, however, of any precedent approving such forced conveyances among private parties as a "means of raising capital" or as an "innovative financing device." *See* ICC Brief at 24. A court need not reach the constitutionality of a statute to acknowledge that the existence of significant constitutional questions counsel against imputing to Congress the intention to adopt the disputed meaning in the absence of some clearer evidence than we have here. *See Eastern R.R. Presidents Conf. v. Noerr Motors*, 365 U.S. 127, 137-38 (1961). Such a rule of statutory construction is applicable even where an agency's interpretation might otherwise be entitled to deference. *See De Bartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568, 574-75 (1988).

B. Structure of Section 402

As noted above, the ICC declares that because "§ 402(a) provides for trackage rights, § 402(d) must have been

intended to provide" for Amtrak's condemnation of the entire fee even though it only required those rights for its intercity passenger service. The Commission also argues that subsection (d) merely provides an alternative means for securing trackage rights that Amtrak is at liberty to exploit. With due respect, we submit that subsection (a)'s provision for Amtrak's use of a railroad's tracks reinforces our understanding of Congress's intent in adding subsection (d) to the statute.

It would seem clear that in structuring section 402, Congress has created parallel procedures by which Amtrak can secure the services, facilities, and properties it requires at reasonable costs: one procedure, detailed in subsection (a), applies when Amtrak wishes to contract for the *use* of a railroad's services, tracks, and other facilities; the other, set out in subsection (d), applies when Amtrak needs to acquire a railroad's property for its own use. This is the framework that Congress created. The Commission's reading of subsection (d), however, sanctions the acquisition of a larger property interest than subsection (a) permits for purposes that subsection (d) does not explicitly authorize. It also allows Amtrak to circumvent the requirement that it bear the cost of maintaining B&M's line at 60 mph capacity merely by finding a buyer who is willing to pay Amtrak for the use of its condemnation powers.

Our reading of the interplay between subsections (a) and (d) is further supported by Congress's policy against cross-subsidization, that is, against having one segment of the rail industry bear the expense of facilities and improvements of primary benefit to another. *See General Am. Transp. Corp.*, 872 F.2d at 1054-55. Consideration of these broader congressional policies is beyond question a legitimate factor in determining the meaning to be given words and phrases that might otherwise be ambiguous. *See Don't Tear It Down, Inc. v. Pennsylvania Ave. Dev. Corp.*, 642 F.2d 527, 533 & n.58 (D.C. Cir. 1980). Read in the manner adopted by the ICC, the statute no longer gives effect to the policy against cross-subsidization.

Rather, the arrangement would promote cross-subsidization by permitting Amtrak to cajole a railroad into providing more than its fair share of the maintenance. Otherwise, Amtrak may condemn the property because of the "low" state of repair and transfer it to a competitor who is willing to pay a premium to secure the financial advantages that might result from acquiring its competitor's properties. Either way, this would amount to a subsidization of higher-cost passenger service by freight rail owners.

We thus conclude that the Commission's construction of the statute is contrary to its unambiguous meaning and Amtrak's use of its power of eminent domain invalid. Congress did not intend to allow Amtrak, by securing a competitor willing to deal with it on more favorable terms, to circumvent the requirements of section 402(a) and its policy against cross-subsidization, and the Commission's construction of the phrase "required for intercity rail passenger service" contravenes the plain meaning of section 402(d) as it allows the taking of property that was neither needed nor even wanted by Amtrak.

III. Conclusion

Because we find the conveyance void on the grounds explained above, we do not reach B&M's further argument that the Commission did not find a "failure to agree" within the meaning of section 402(a), nor do we reach the valuation or competition issues raised by the other petitioners. As already stated, having found the Commission's interpretation invalid under the Act, we need not address B&M's constitutional argument. The petition for review in No. 88-1631 is granted; the order of the Commission approving the taking of B&M's track is set aside. The petitions in the other dockets are dismissed as moot in light of our disposition of No. 88-1631, which is remanded to the Commission for further proceedings consistent with this opinion.

So ordered.

GINSBURG, RUTH B., *Circuit Judge, concurring in granting the petition for review in No. 88-1631*: I agree that a remand is warranted; I write separately, however, to emphasize that I rely on the inadequacy of the Commission's assessment *in this case*, not on the precedent-setting construction of the statute decreed by the majority opinion. My colleagues interpret section 402 of the Rail Passenger Service Act (RPSA), 45 U.S.C. § 562, as denying Amtrak recourse to the full eminent domain power conferred by section 402(d) when Amtrak's ultimate aim is to secure only the *use* of tracks, a use for which section 402(a) provides. I am not convinced that the court, overriding the agency, has identified the only plausible reading of the statute; nor am I persuaded that if Amtrak is accorded any leeway to choose the property acquisition route when it could instead settle simply for trackage rights, the inevitable result will be "bidding wars" among private railroad companies for Amtrak's condemnation powers.

Nothing in the text of the RPSA, or in its legislative history, appears to me to force the conclusion, reached by my colleagues, that because trackage rights are central to the challenged transaction, Amtrak had to resort to section 402(a), or, alternately, attempt to condemn a lesser property interest (*i.e.*, secure an easement) under section 402(d), before invoking in full its section 402(d) eminent domain power. My colleagues find a textual basis for their conclusion in the statute's stipulation that if a planned condemnation would "significantly impair the ability of the [target] railroad to carry out its obligations as a common carrier," 45 U.S.C. § 562(d)(1)(A), Amtrak's need for the property sought will be disproven whenever the Commission also finds that Amtrak's passenger service obligations "can adequately be met by the acquisition of alternative property (including interests in property) which is available for sale [to Amtrak] on reasonable terms." 45 U.S.C. § 562(d)(1)(B).

The requirement that Amtrak exhaust any course short of full condemnation is triggered only when a proposed

condemnation also threatens to impair the condemnee's performance as a common carrier. In this case, the ICC specifically concluded that the acquisition of B&M's track would pose no such threat:

> [B&M] has also failed to meet criterion (A), regarding significant impairment of B&M's common carrier obligations resulting from the conveyance. B&M is receiving just compensation for the property being conveyed and has the option of retaining its local traffic through a trackage rights agreement. Its ability to carry out its common carrier obligations over its entire system, and even to the shippers on the line conveyed, will not be impaired.

National Railroad Passenger Corp. — Conveyance of Boston and Maine Corp. Interests in Connecticut River Line in Vermont and New Hampshire, 4 ICC 2d 761, 773 (1988). Given this explicit ICC determination under section 402(d)(1)(A), a determination within the ICC's expertise and entitled to judicial deference, the less restrictive alternative requirement of section 402(d)(1)(B), it seems to me, is simply not implicated in this case.*

Nor do I agree that allowing Amtrak to obtain trackage rights via its section 402(d) eminent domain powers necessarily renders superfluous section 402(a)'s trackage rights acquisition authority. Before obtaining ICC approval of a proposed condemnation, Amtrak, all agree, must establish that the property or property interests it

---

*My colleagues contend that in conducting the subsection (A) inquiry into impairment of common carrier obligations, the ICC should have considered the effect of the condemnation in isolation, not as potentially alleviated by post facto remedies, such as the retention of trackage rights by the condemnee. If an approach so rigid were mandated by the RPSA, however, no outright condemnation could ever occur on any railroad with significant freight traffic — a drastic result unsupported by logic or by any discernible congressional intent. *Cf.* Penn Central Transp. Co. v. New York City, 438 U.S. 104, 137 (1978) (considering post facto remedies, such as transferred development rights, in evaluating whether historic preservation law effected a taking under the fifth amendment).

seeks to acquire are "required for intercity rail passenger service." 45 U.S.C. § 562(d)(1). It is plausible, however, as I will next illustrate, that Amtrak's fulfillment of its intercity rail passenger service obligations might on occasion require not merely trackage rights, but trackage rights in conjunction with a transfer of ownership. In such instances, and such instances alone, the ICC could properly approve a use of section 402(d) of the kind undertaken here.

I recount in this light the story Amtrak tells. Following the purchase of the B&M line and a parallel line to the west, the Delaware and Hudson (D&H), by Guilford Transportation Industries in 1983 and 1984, service along B&M's Conn River Line deteriorated drastically. By 1987, when Montrealer service was temporarily discontinued, the average travel time over the Conn River Line had increased approximately 67% over 1981 levels; according to Amtrak, B&M repeatedly refused to upgrade the line, and even slated the segment for abandonment on its 1987 system map. Amtrak suggests that B&M's intransigence may have been motivated not by Amtrak's unwillingness to pay its fair share of the cost of maintaining the line to passenger service standards, but by B&M's conscious decision to favor its parallel D&H line. *See* Joint Brief of Intervenor-Respondents National Railroad Passenger Corporation, Central Vermont Railway, Inc., State of Vermont, and Windsor Minerals, Inc. at 4, 6.

Soon after the April 1987 Montrealer shutdown, Congress appropriated $5 million for improvements needed to restore Montrealer service. *See* Act of July 11, 1987, Pub. L. No. 100-71, 101 Stat. 391, 447 (1987). Under the circumstances as alleged by Amtrak, obtaining trackage rights from B&M under section 402(a) of the RPSA would not have sufficed to assure realization of the congressional objective to get the Montrealer back on track. B&M, in Amtrak's view, was unwilling, and would remain reluctant, to perform the necessary work: only trackage rights coupled with a change in the underlying ownership would do. Indeed, confining Amtrak to its section 402(a) avenue

under such circumstances could have left it vulnerable to just the sort of extortion by private landowners pointed to by my colleagues as having motivated Congress to confer the eminent domain power contained in section 402(d). Had the ICC found from the record that the picture painted by Amtrak was accurate, therefore, I would uphold the challenged transaction.

No such ICC determination, however, can be gleaned from this record. Tugging just the other way, counsel for the ICC conceded at oral argument that the agency had made no independent effort to ascertain whether the B&M-CV conveyance was in fact required to meet Amtrak's passenger service obligations. ICC counsel further disavowed any doubt as to B&M's competence to maintain the track in question:

> COUNSEL: Given the fact that Amtrak had this money to put into [track] rehabilitation . . . .
>
> COURT: So we're talking money?
>
> COUNSEL: It wanted to make sure that the money was well spent, under the person who was exercising control over the maintenance.
>
> COURT: Is there anything in the record to suggest that the root of the controversy between B&M and Amtrak was the competence of B&M to do the proper job . . . ?
>
> COUNSEL: No . . . .

Because these concessions indicate that the ICC shirked its obligation in this case to monitor closely Amtrak's exercise of the broad eminent domain power conferred by section 402(d) of the RPSA, I agree that the petition for review must be granted.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Filed February 25, 1991

No. 88-1631

BOSTON AND MAINE CORPORATION, PETITIONER

v.

INTERSTATE COMMERCE COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

WINDSOR MINERALS, INC., *et al.*, INTERVENORS

and consolidated case Nos. 88-1728, 88-1731 & 88-1732

Before Ruth B. Ginsburg, Buckley and D.H. Ginsburg, *Circuit Judges.*

ORDER

Upon consideration of the motions for stay of mandate it is

ORDERED, by the Court, that the Clerk is directed to withhold issuance of the court's mandate through March 11, 1991.

Per Curiam
FOR THE COURT:
CONSTANCE L. DUPRE,
CLERK
BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

NATIONAL RAILROAD PASSENGER CORPORATION—CONVEYANCE OF BOSTON AND MAINE CORPORATION INTERESTS IN CONNECTICUT RIVER LINE IN VERMONT AND NEW HAMPSHIRE

Finance Docket No. 31250[1]

Decided August 4, 1988

Connecticut River Line conveyed to the National Railroad Passenger Corporation (Amtrak) under § 402(d) of the Railroad Passenger Service Act (RPSA), 45 U.S.C. § 562(d). Standards to establish compensation set and amount determined. Related petition for exemption filed by Central Vermont Railway, Inc. to acquire Amtrak's interests in the line once Amtrak has acquired those interests granted.

DECISION

BY THE COMMISSION:

By decision served April 29, 1988, we instituted the lead proceeding pursuant to an application filed by the National Railroad Passenger Corporation (Amtrak) under § 402(d) of the Railroad Passenger Service Act (RPSA), 45 U.S.C. § 562(d), for the conveyance of the Connecticut (or Conn River) Line and certain other property interests belonging to the Boston and Maine Corporation (B&M), so that Amtrak may resume its Montrealer passenger service over that line. We consolidated this proceeding with a related petition for exemption filed by Central Vermont Railway, Inc. (CV) in Finance Docket No. 31259 for its acquisition

---

[1] This decision also embraces Finance Docket No. 31259, *Central Vermont Railway, Inc.—Petition for Exemption—Acquisition and Operation of Certain Interests in Rail Lines from the National Railroad Passenger Corporation.*

of the subject line and related interests from Amtrak once Amtrak has obtained these interests and for CV's conveyance of trackage rights over the line to B&M at that time. In that decision, we also adopted an expedited schedule to allow the Commission to issue separate decisions: (1) on the issue of whether an order establishing need for the conveyance of the line and requiring the conveyance is appropriate;[2] and, if so, (2) on the issue of just compensation for the line.

We have received numerous pleadings, comments and letters concerning this proceeding.[3] A protest and comments were filed by the Railway Labor Executives' Association (RLEA) joined by the United Transportation Union (UTU). On May 16, 1988, comments in support of Amtrak's case on the issue of "need" for the line and on CV's exemption petition were filed by the Commonwealth of Massachusetts (MA), the State of New Hampshire (NH), the State of Vermont (VT) and Windsor Minerals, Inc. (Windsor). On May 31, 1988, B&M filed its evidence and argument in opposition to Amtrak's application on the "need" issue and CV's petition for exemption, and Canadian Pacific, Ltd. (CP) filed its comments and argument in opposition to CV's petition for exemption. On June 3, 1988, Amtrak filed rebuttal testimony along with proposed conditions and terms for the conveyance. Rebuttal was also filed by CV, MA, and Windsor. On June 8, 1988, the first phase of the proceeding addressing the "need" issue and

---

[2] We also stated that CV's exemption petition would be decided along with the issue of "need' for the line.

[3] The Commission received 72 letters in support mainly from former passengers residing in Vermont, New Hampshire, Rhode Island, Pennsylvania, Maryland and Washington, D.C. Comments and letters were also received from the Lake Champlain Regional Chamber of Commerce in VT, City of Montreal, Congressman Sylvio Conte and U.S. Senators Bill Cohen, Christopher J. Dodd, Nancy Landon Kassebaum, Edward M. Kennedy, John F. Kerry, Patrick J. Leahy, George Mitchell, and Robert T. Stafford.

CV's exemption was completed with the filing of final briefs in support by Amtrak, CV, MA, VT, and Windsor, and in opposition by B&M and CP. RLEA subsequently filed comments in opposition to Amtrak's proposed conditions and terms.

By decision served July 5, 1988 in Finance Docket No. 31250, we stated that we considered the extensive record developed in this proceeding on the issue of need, including the letters and comments, the various related agreements between the parties, the evidence generated through discovery, and the arguments presented by the parties. Based on the evidentiary record developed, we decided that Amtrak had sustained its burden of proof and established a need for the conveyance requested. A complete discussion of that issue is set forth in this decision.

By separate decision served on July 5, 1988 in Finance Docket No. 31259, we also decided that, because certain allegations made in opposition to the exemption raised competitive issues[4] that we believed warranted a supplemented record, we would defer decision on the exemption request to allow the parties the opportunity to submit further evidence focusing on those competitive concerns. We amended our procedural schedule in this case to provide 15 days for the parties to supplement the record on competitive concerns and an additional 5 days for simultaneous

---

[4] On June 23, 1988, CP filed a petition to recognize substantially changed circumstances, including the recently filed bankruptcy petition by B&M's affiliate, Delaware & Hudson Railway Company (D&H). B&M also filed a petition seeking an extension of the procedural schedule to allow consideration of these new circumstances by the Commission. On June 27, 1988, Amtrak and CV filed a joint reply in opposition to these petitions. However, Amtrak and CV stated that they were agreeable to postponing a decision on CV's petition for exemption for 10 days to allow CP and B&M to submit their competitive theories and arguments to the Commission for consideration in that portion of the proceeding. Given our findings here, no further action was necessary on these petitions.

filing of replies. The record on this portion of the proceeding closed July 25, 1988, and our decision on the exemption petition is set forth below with our decision on just compensation.

Amtrak's initial filing on just compensation was included in its April 4th application. On June 13, 1988, MA submitted its opening evidence and argument on just compensation. On June 28, 1988, Amtrak filed its supplemental evidence on just compensation.[5] On July 5, 1988, B&M filed its argument and evidence on just compensation. RLEA also filed its evidence and brief on the issue of just compensation.[6] On July 13, 1988, this second phase of the proceeding was completed with the filing of B&M's supplemental evidence in response to Amtrak's June 28th supplemental evidence and the filing of rebuttals to B&M's argument and evidence by Amtrak, MA, and VT.

We have considered the evidentiary record developed on just compensation and the parties' arguments on the methodologies for valuation. We have determined that, of the methodologies submitted, going concern value and net liquidation value are most appropriate for use here. The higher of the two constitutes just compensation for the transfer. The CV petition for exemption meets the criteria of 49 U.S.C. § 10505. Thus, all aspects of the proposal are granted, subject to certain conditions, as discussed below.

BACKGROUND

In its application filed April 4, 1988, Amtrak requested that the Commission order that a line of railroad and certain other property and contract interests belonging to

[5] Amtrak filed its confidential version of its supplemental evidence with the Commission on June 29, 1988.

[6] We will dismiss RLEA's motion for leave to file one day late, as its filings were timely received and stamped July 5, 1988, by the Commission.

B&M, a subsidiary of Guilford Transportation Industries, Inc. (Guilford), be conveyed to it pursuant to § 402(d) of RPSA. The line consists of a 48.8-mile segment of the Conn River Line. The segment runs along the Connecticut River, starting at Brattleboro, VT (approximately milepost 60.1), crossing the river at Bellows Falls, VT (approximately milepost 83.8) into New Hampshire and crossing back to Vermont near Windsor, VT (approximately milepost 108.3), where this segment ends. Specifically, Amtrak sought in its application the following property or contract interests in the Conn River Line:

(a) all rights, titles and interests (with the exception of interests in existing fiber optics leases) in the rail right of way and structures between a point where the CV-owned trackage at the north end of the Connecticut River Bridge in Windsor, VT terminates (approximately B&M milepost 108.3) and a point where CV-owned trackage at Bridge Street in Brattleboro, VT (approximately B&M milepost 60.1) commences;

(b) all rights, titles and interests in a spur track (known as the Brattleboro or West River spur) and right of way extending from the CV right of way to a line 10 feet east of the center line of the spur and approximately 1,300 feet south of Bridge Street in Brattleboro to the crossover to the CV-owned trackage;

(c) the right to dispatch operations over the trackage between White River Junction, VT and East Northfield, MA secured to B&M by virtue of the trackage rights agreement between CV and B&M dated January 1, 1930, (1930 Agreement) and other informal operating arrangements between CV and B&M;

(d) all rights, including those under the 1930 Agreement to maintain and operate the segment of CV trackage between the point north of the Connecticut River Bridge where B&M-owned trackage terminates (approximately B&M milepost 108.3) and a point adjacent to the passenger

depot at Windsor, VT (approximately B&M milepost 108.9) where CV owned and maintained trackage commences; and

(e) all rights, titles and interests in the signalling system (including poles, wires and circuitry) between White River Junction and East Northfield, including approaches (track signalling circuitry) at White River Junction and East Northfield.

In our April 29th decision, we adopted a procedural schedule for the resolution of the proceeding and allowed the parties to conduct discovery. Parties were given five days to file with the Commission and serve on the other parties their objections to any aspect of the procedural schedule. To facilitate the expeditious resolution of this proceeding while giving parties the opportunity to conduct meaningful discovery, we granted Amtrak's petition to waive 49 C.F.R. § 1114.30 requiring parties to obtain prior Commission approval to conduct document discovery. In addition, we granted petitions to intervene filed by CP, MA, VT, and the Connecticut Department of Transportation (CDT). We denied B&M's request that the application be rejected. We found: (1) that Amtrak had sufficiently demonstrated that the parties have not been able to agree on the sale of the line to warrant the institution of a proceeding under § 402(d); (2) that the issue of whether the transfer of the line to CV should be reviewed under the terms of 49 U.S.C. §§ 11343 and 11344 would be considered with the application on the merits; and (3) that § 402(d) does authorize the Commission to compel the conveyance of a line of railroad. Similarly, we found no need to grant CP's motion to broaden the scope of this proceeding as parties could raise any relevant issues in the consolidated proceeding and we would address them in the resolution of this case on the merits. Finally, Amtrak was given five days to file with the Commission and serve on the parties: (1) copies of its agreements with CV; (2) copies of its 1977 operating agreement with B&M; and

(3) an environmental report or explain why one is unnecessary here.

By decision served May 11, 1988, we denied objections to the procedural schedule filed by B&M and clarified the procedural schedule to provide that labor protection will be considered as part of our determination of just compensation for the line. Additionally, we granted petitions to intervene filed by RLEA and Windsor.

By decision served May 25, 1988, we denied B&M's petition to convert Amtrak's application filed under § 402(d) to an application filed under § 402(a). We granted a petition to intervene filed by NH, and although the time period for filing discovery requests had expired, we provided for discovery upon NH to ensure a fair proceeding. Also, we dismissed petitions to intervene filed by MA and VT in Finance Docket No. 31259 as both had already been made parties by the April 29th decision, which also consolidated the two proceedings.

On June 1, 1988, the Director of the Office of Proceedings denied B&M's motion to compel having found that the supplemental responses provided by Amtrak and CV adequately responded to the interrogatories and document requests made by B&M. Although certain confidential information and documents were withheld with respect to request No. 45, the Director found them to be protected by the attorney-client and/or attorney work product privilege.

By decision served June 3, 1988, we denied B&M's petition to reopen our April 29th decision. We affirmed our April 29th decision that Amtrak had sufficiently demonstrated that B&M and it had not been able to agree on the sale of the line in question to warrant the institution of a proceeding under § 402(d) and rejected B&M's argument that we committed material error in our April 29th decision regarding our power under § 402(d) to order the conveyance of the subject line.

On June 6, 1988, the Director issued a notice to the parties ordering them to include with their final briefs any comments or arguments on Amtrak's proposed conditions and terms for the conveyance of the Conn River Line included in its June 3rd rebuttal should the Commission find that Amtrak's need for the line has been established and that B&M should be required to convey the line pending a final determination of just compensation for the line.

Parties completed this phase of the proceeding on June 8, 1988, when they filed final briefs addressing the "need" issue and CV's exemption petition. As previously stated, we issued a decision in Finance Docket No. 31250 on July 5, 1988 finding that Amtrak has sustained its burden of proof and established a need for the conveyance requested and, in this decision, are setting forth our complete discussion on that issue.

The second phase (just compensation) of the proceeding was also the subject of several procedural orders. On June 7, 1988, the Acting Director granted Amtrak's motion to compel B&M to permit Mr. Paul Larner, a CV dispatcher, access to certain train dispatch sheets. On June 21, 1988, the Chairman found that a request filed by B&M for procedural relief was premature since Amtrak had not as yet late-filed any supplemental evidence on the issue of just compensation for the line. The Chairman indicated that, if Amtrak filed supplemental evidence at a later date in this proceeding, the Commission would then address whether it should be accepted and, if so, what would be required to provide B&M with an adequate opportunity to respond to that evidentiary filing. And, on June 22, 1988, the Chairman denied a motion filed by Amtrak other than to compel B&M to respond to Interrogatory No. 26, which involved information relevant to Amtrak's determination of compensation for the taking of the line based on the line's going concern value.

By decision served July 5, 1988, we: (1) denied B&M's request for an additional two weeks to submit argument and evidence on just compensation; (2) accepted Amtrak's late-filed supplemental evidence on just compensation; and (3) denied B&M's earlier motion for procedural relief. Parties were notified July 1, 1988. Also on July 5, 1988, the Chairman granted Amtrak's motion to keep confidential certain copies of the Second Supplemental Verified Statement of Robert L. Banks and Charles H. Banks filed under seal.

On July 11, 1988, the Chairman granted Amtrak's motion to permit B&M to file by July 13th additional evidence in response to issues raised by the new material in Amtrak's June 28th supplemental evidence. Amtrak argued that B&M's claim that these proceedings violated standards of due process, since B&M had not been afforded adequate time to prepare evidence in response to Amtrak's late-filed supplemental evidence, is entirely without merit and that the Commission's July 5th decision is correct. Nevertheless, Amtrak moved that B&M be afforded the opportunity to submit additional evidence.

By decision served July 19, 1988, we denied B&M's petition requesting reconsideration of the Chairman's decision compelling B&M to answer Interrogatory No. 26, which had been served on B&M on May 2, 1988.

Parties completed this second phase of the § 402(d) proceeding on July 13, 1988. Amtrak made two significant changes from its initial presentation. It incorporated into its application a trackage rights agreement for the benefit of B&M that had been contained in the CV exemption, and it reduced the amount of B&M property it sought to acquire and adjusted its proposed compensation accordingly.

As noted earlier, we held open the record in the exemption proceeding until July 25, 1988, to allow further

comments on competitive issues including the effect of the D&H bankruptcy petition.

DISCUSSION AND CONCLUSIONS

I. AMTRAK'S § 402(d) APPLICATION.

Amtrak filed an application under § 402(d) of the RPSA, 45 U.S.C. § 562(d), to require immediate conveyance of the Conn River Line from B&M to Amtrak, and as an integral part of the overall transaction, immediately from Amtrak to CV pursuant to the accompanying exemption petition, under which CV would also grant trackage rights to B&M to operate over its former line segment. As noted above, in subsequent filings Amtrak has clarified that the trackage rights over the line for B&M be included as a term and condition of conveyance in its § 402(d) application, rather than the CV exemption, and will be discussed *infra*, with our determination of just compensation of the line.

Section 402(d) provides, in relevant part, as follows:

(d) Disagreement procedures

(1) If the Corporation and railroad are unable to agree upon terms for the sale to the Corporation of property (including interests in property) owned by the railroad and required for intercity rail passenger service, the Corporation may apply to the Commission for an order establishing the need of the Corporation for the property at issue and requiring the conveyance thereof from the railroad to the Corporation on reasonable terms and conditions, including just compensation. Unless the Commission finds that—

(A) conveyance of the property to the Corporation would significantly impair the ability of the railroad to carry out its obligations as a common carrier; and (B) the obligations of the Corporation to provide modern, efficient, and economical rail passenger service can adequately be met by the acquisition

of alternative property (including interests in property) which is available for sale on reasonable terms to the Corporation, or available by the exercise of its authority under § 545(d) of this title,

the need of the Corporation shall be deemed to be established and the Commission shall order the conveyance of the property to the Corporation on such reasonable terms and conditions as it may prescribe, including just compensation.

In its application, Amtrak acknowledges that this is an extraordinary proceeding. We agree. In fact, only once before has the Commission even had occasion to institute a proceeding under § 402(d) of RPSA, and that case was resolved before the Commission could issue a decision on the merits.[7] With this in mind, we turn to Amtrak's current application.

Amtrak states that it has exhausted all alternatives to condemnation and has found it necessary to resort to the condemnation powers under § 402(d) in this case. We acknowledged in our May 25th decision that, under §§ 402(a)-(d) of RPSA, Amtrak is empowered to seek different types of relief depending on the type of service problems it encounters with other railroads. In each case, relief may be granted only upon application by Amtrak, and in each case different criteria, procedures, and standards apply. *See* 45 U.S.C. §§ 562(a)-(d). Here, Amtrak has made an election of remedies by filing its application under § 402(d) for conveyance of the subject line, and has done so delib-

[7] In Finance Docket No. 30895, *National Railroad Passenger Corporation—Conveyance of Conrail Line in Wayne County, MI*, Amtrak subsequently withdrew its application stating that the parties had reached an agreement adequately protecting its interest in providing passenger service over the subject line. By decision served December 15, 1986, the Commission terminated the proceeding before addressing the statutory criteria regarding a conveyance under § 402(d).

erately. We affirm our finding, as supplemented below, that Amtrak has met the statutory criteria for the institution of a proceeding under § 402(d) and, thus, is plainly entitled under the statute to a decision on the requested conveyance of the line.[8]

A. Statutory prerequisite that Amtrak and B&M are "unable to agree" on sale terms.

In its May 31st argument and evidence, B&M rejects the Commission's findings in two prior decisions and restates its argument that Amtrak has failed to demonstrate that parties are "unable to agree" on the voluntary purchase and sale of the subject property, a necessary prerequisite to Amtrak's filing of an application under § 402(d). B&M states that it has no obligation to make any kind of proposal to Amtrak to sell the Conn River Line, but that it continues to be willing to discuss the matter. Institution of this proceeding never prohibited parties from settling this case and parties' current willingness to discuss the sale of the line has no bearing on our initial finding that the statutory prerequisite—that parties are "unable to agree"—had been met. We affirm our prior decisions finding that Amtrak has sufficiently demonstrated that the parties have not been able to agree on the sale of the line and this warrants the institution of a proceeding under § 402(d).

B. Transaction is within the scope of § 402(d).

Again B&M maintains that § 402(d) does not authorize the Commission to compel conveyance of an existing rail line nor does it authorize Amtrak to acquire by eminent domain any line of railroad. Additionally, B&M contends that the attempt to use § 402(d) to divest B&M's ownership

---

[8] B&M continues to argue statutory and jurisdictional issues under § 402(d) that we have already disposed of in previous decisions. B&M has failed to present anything that was not considered in reaching our prior decisions on these matters.

in the line and immediately to convey the line to CV through Amtrak violates the intent of the statute and abuses its processes. B&M states that the Commission would violate the rail transportation policy and public policy if it permitted Amtrak to use § 402(d) to restructure the ownership of freight lines.

As we stated in our June 3rd decision, we reject B&M's argument that we committed material error in our April 29th decision regarding our power under § 402(d) to order the conveyance of the subject line. In our April 29th decision, we found that Congress has clearly expressed its intent to sanction the acquisition of existing and operating lines of railroads by Amtrak under § 402(d) based on the clear language of the statute. B&M has failed to present anything that was not already considered in reaching our decision on that issue. Thus, we affirm our prior decisions.

With regard to the charge of abuse of process, Amtrak strongly disputes B&M's contention that Amtrak's proposed transaction constitutes an abuse of the processes under § 402(d). B&M contends that Amtrak has no discretion in the proposed transaction under the agreement between Amtrak and CV, so even if Amtrak is authorized to take the line, there is a possibility Amtrak may not proceed with the condemnation if CV exercises its right to not proceed with its acquisition which would result in a complete waste of time. Rebutting B&M's argument that the entire proposal is one by which CV and Amtrak seek to manipulate the statutory process in order to enable CV, which is a part of the Canadian National Railway, Inc. (CN) system and a direct competitor of B&M, to become owner of the Conn River Line, both Amtrak and CV confirm that the agreements leading to this proceeding were negotiated at arms length to achieve their respective corporate and public interests, and not to further some impermissible objective of CV's affiliate, CN. Contrary to B&M's argument that Amtrak has no financial stake in these proceedings, Amtrak reiterates that it will be pro-

viding more than $3 million in funds which have been appropriated specifically for its benefit by Congress.[9] Amtrak states that in exchange for this investment, it will obtain rehabilitation of the rail line, a guaranteed 20 years of proper maintenance on the rail line,[10] and a commitment allowing Amtrak trains to operate on the rail line at a reasonable, predetermined compensation level. Amtrak also states that it has agreed to the current arrangements with CV and, unlike B&M's characterizations, Amtrak is not proceeding contrary to the scheme of the statute as it, in fact, has a voice in the proceedings. Thus, we conclude that Amtrak has demonstrated that it has not abused the process available under § 402(d) by means of its dealings with CV.

B&M also continues to assert that Amtrak could achieve the same result as it would if its application were granted by invoking the provisions of § 402(a) of the RPSA which authorizes the Commission to fix terms and conditions for use of tracks and facilities of railroads. B&M requests that the Commission reconsider its May 25th decision, in which we denied B&M's request that the proceeding be converted from one under § 402(d) to one under § 402(a). We affirm our finding that Amtrak has met the statutory criteria for the institution of a proceeding under § 402(d) and, thus, is entitled under the statute to a decision on the requested conveyance of the line.

B&M further argues that Amtrak could achieve its purposes under § 402(d) by acquiring an easement or trackage

---

[9] Congress has appropriated $5 million for the rehabilitation of the line. Amtrak intends to use approximately $3 million on the subject line through Vermont and $2 million on the portion of line through Massachusetts.

[10] In its filing, MA requests that we grant Amtrak the perpetual right to operate passenger service over the line. Contrary to MA's argument, we find it unnecessary to do so because § 402(a) permits Amtrak to acquire such trackage rights in the future, in the event such action becomes necessary.

rights for passenger service without divesting B&M of ownership. However, since § 402(a) provides for trackage rights, § 402(d) must have been intended to provide more. We find that Amtrak has demonstrated sufficient reason to justify acquisition of ownership of the line. We find no abuse of § 402(d) processes here.

Finally, we find unfounded B&M's fears that a favorable decision for Amtrak would encourage any freight railroad to acquire ownership of a competitor's line simply by currying Amtrak's favor and agreeing to grant trackage rights to the former owner. B&M argues that allowing Amtrak to use § 402(d) to transfer ownership of the Conn River line from B&M to CV would subvert the Commission's responsibilities and would nullify the principle that Commission authorization is permissive rather than mandatory. As Amtrak points out, however, § 402(d) of RPSA contemplates transactions subject to the Commission's scrutiny, and we may impose our consolidation regulations at 49 C.F.R. Part 1180 if major competitive or other alterations might result from a subsequent conveyance of a line Amtrak acquires under § 402(d) to freight carriers. We will not permit transfers that are not in the public interest and consistent with the relevant statutory criteria. Furthermore, DOT/FRA and Congress are able to prevent any pattern of abuse through their supervision of Amtrak's operations.

C. Constitutionality of § 402(d).

B&M argues that § 402(d) is unconstitutional. B&M contends that: (1) the irrebuttable presumption of need, regardless of actual need, violates the procedural due process requirement of the Fifth Amendment because the opposing party is foreclosed from receiving a meaningful hearing; (2) by allowing Amtrak to determine in its absolute discretion whether property of another railroad is required for intercity passenger service, § 402(d) unconstitutionally delegates legislative fact-finding authority to Amtrak con-

ferring upon it the power to control and dispose of individual rights to property without any guidelines restricting Amtrak's power; and (3) Amtrak's proposed taking of the Conn River Line for immediate conveyance to CV violates the "public purpose" requirement of the Fifth Amendment. B&M argues that it finds no public purpose because this line is not necessary for rail passenger service, Amtrak does not want to own the line, it only wants to transfer the line to CV, and Amtrak can achieve its goal without divesting B&M's ownershp.

As we have stated in *San Antonio, TX v. Burlington Northern Inc.*, 1 I.C.C.2d 561 (1986), it it not within the Commission's province to determine whether a particular statute is unconstitutional. Our function is to interpret the law as it is enacted and to enforce it as intended by Congress. We will therefore refrain from addressing B&M's constitutional arguments. If any party wishes to challenge the constitutionality of § 402(d) of RPSA, they should bring an action in an appropriate district court. 28 U.S.C. 1331, 1337. *See State of Texas v. United States*, 730 F.2d 409, 419 n.42 (5th Cir. 1984), amended on rehearing, 749 F.2d 1144 (5th Cir. 1985); *State of Texas v. United States*, 730 F.2d 339 (5th Cir. 1984), *cert. denied*, 105 S. Ct. 267 (1984). We note that in any event most of the arguments B&M has raised here were raised and rejected in *Metropolitan Transportation Authority v. I.C.C.*, 792 F.2d 287 (2d Cir. 1986), *cert. denied*, 107 S. Ct. 669 (1986).

Furthermore, by ordering the line conveyed to Amtrak as part of an overall transaction whereby Amtrak will ultimately convey the line to CV, we are not applying the statute in an unconstitutional manner. A secondary conveyance related to Amtrak's exercise of its eminent domain powers has already been judicially approved. *See National Railroad Passenger Corp. v. Two Parcels of Land*, 822 F.2d 1261 (2d Cir. 1987), *aff'd sub nom. Hagar v. National Railroad Passenger Corp.*, ___ U.S. ___, 108 S. Ct. 347 (1987). Here, Amtrak has established that its

interest in having the line conveyed is so that it may reinstitute its Montrealer passenger service--clearly a "public purpose."

D. Amtrak's need is established.

Section 402(d) states that the need of Amtrak for the property at issue shall be established unless the Commission finds both: (A) that the conveyance would significantly impair the railroad's ability to carry out its obligations as a common carrier; *and* (B) that Amtrak's obligations to provide modern, efficient, and economical rail passenger service can adequately be met by the acquisition of alternative property (including interests in property).

B&M argues that Amtrak has an entirely feasible and even better route through Schenectady, NY, adding that Amtrak already operates on that line without any problems. This is not, Amtrak claims, an alternative route for the Montrealer as it is already used as an Amtrak route for the Adirondack train service. The operation of another passenger train over this line would not meet Amtrak's expressed need—to provide passenger train service from New York through Connecticut, Massachusetts, Vermont, and New Hampshire to Montreal, thereby servicing certain areas along that route currently without any passenger train service.

Furthermore, B&M argues that there is no valid reason to insist upon operating through Vermont and that the alleged need for service through Vermont is exaggerated. B&M points out past low rail ridership, adequate bus service and no Congressional mandate for passenger rail service through Vermont. These points are irrelevant to this proceeding as Congress has given Amtrak the authority to determine the necessity to restore the Montrealer through Vermont. *See Supplemental Appropriations Act*, 1987, Pub. L. No. 100-71, 101 Stat. 391, where Congress has specifically appropriated some $5 million so that Am-

trak could resume the Montrealer service between Springfield, MA and Montreal, Canada through Vermont.

Amtrak states that it considered two alternative routes through Vermont, but disqualified both of them. In its final brief, VT explains that these potential routes would require rehabilitation expenditures far beyond the funding sources available to Amtrak or itself to sustain any sort of passenger service. B&M does not dispute this analysis. We therefore find that there is no adequate alternative property available for Amtrak to acquire the Montrealer service.

B&M must meet both criteria above to rebut the presumption of Amtrak's need for the property at issue and has already failed to prove criterion (B). It has also failed to meet criterion (A), regarding significant impairment of B&M's common carrier operations resulting from the conveyance. B&M is receiving just compensation for the property being conveyed and has the option of retaining its local traffic through a trackage rights agreement. Its ability to carry out its common carrier obligations over its entire system, and even to the shippers on the line conveyed, will not be impaired. Accordingly, we find that Amtrak has established its need under § 402(d) to warrant conveyance of the Conn River Line for the restoration of the Montrealer passenger service.

II. JUST COMPENSATION

In this proceeding, we are asked to fix just and reasonable compensation to B&M, pursuant to § 402(d) of the RPSA, for the Conn River Line and certain other property interests belonging to B&M ordered to be conveyed to Amtrak for the restoration of the Montrealer passenger service over the line. No express guidelines govern the Commission's fixing of "just and reasonable" compensation. Parties recognize, as stated by both Amtrak and B&M, that just compensation is not determined by reference to fixed or inflexible rules, but rather by application

of valuation principles suited to the particular circumstances. Both Amtrak and B&M recognize that fair market value (FMV) is the standard by which just compensation is generally determined.

Parties have proposed several valuation methodologies and estimates of FMV. These methodologies include Original Cost Less Depreciation (OCLD), Replacement Cost New Less Depreciation (RCNLD), Comparable Sales (CS), Going Concern Value (GCV), and Net Liquidation Value (NLV). B&M argues that OCLD is the most appropriate methodology and submits an OCLD of approximately $10.2 million, which it claims is equivalent to its book value for the line. B&M further argues that a $5.7 million NLV is the minimum amount of just compensation constitutionally required. On the other hand, Amtrak, supported by MA and VT, argues that GCV is the most appropriate methodology and submits an estimated GCV of $531,122. Discussions of the various methodologies, positions of the parties, and our analysis follows.

A. Explanation of Methodologies.

1. *Original Cost Less Depreciation.* B&M argues that OCLD is the most appropriate method of determining just compensation and submits that the OCLD of the subject line is its book value, which it claims is $10.2 million. Under this approach, B&M states that the FMV is determined by increasing the original cost of the property by capital improvements and deducting depreciation and any physical deterioration. MA likewise states that OCLD includes the installation cost less depreciation of all capitalized improvements, and that OCLD is sometimes referred to as "net investment." MA adds that OCLD measures the asset base of the facilities on the rail carrier's book for regulatory purposes in establishing revenue adequacy and that OCLD should be used as the maximum upper limit. Although MA contends that OCLD is generally

the most appropriate methodology, it states the GCV as advocated by Amtrak would be most appropriate here.

Amtrak did not address OCLD in its initial arguments and evidence; however, Amtrak has submitted rebuttal argument stating that OCLD is generally not appropriate as a measure of just compensation. B&M argues that OCLD is used most often when: (1) parties disagree dramatically with regard to the property's FMV; or (2) the use of the market value asserted by the condemnor would be unjust. Here, B&M contends that the parties disagree dramatically as to market value, and the GCV proposed by Amtrak is unconscionably low, and therefore this is a situation where OCLD would be most appropriate.

B&M relies on factual similarities of two cases, *Port Authority Trans-Hudson Corp. v. Hudson Rapid Tubes Corp.*, 20 N.Y.2d 457 (1967), *cert. denied*, 390 U.S. 1002 (1968) (*Hudson Tubes*) and *In the Matter of the Valuation Proceedings Under §§ 303(c) and 306 of the Regional Rail Reorganization Act of 1973*, 445 F. Supp. 994 (Special Court 1977) (*Valuation Proceedings*). Both Amtrak and VT distinguish these cases from the present situation. In *Hudson Tubes*, Amtrak points out that the alternative method produced no value at all while, here, probative evidence has shown an alternative method will result in a meaningful award. VT points out that B&M contends its operations on the Conn River Line has provided marginal results similar to the situation of the owner in *Hudson Tubes* and the bankrupt transferors in *Valuation Proceedings*, but when arguing about GCV, B&M contradicts itself by agreeing with Amtrak that B&M is profitable and even contends that Amtrak has grossly underestimated GCV. In *Valuation Proceedings*, Amtrak and VT point out that the court does not adopt OCLD as a valuation method and in fact the court stated that "the parties should not read this discussion of original cost to indicate that we are bound to it as a factor in valuation* * * * We propose it only as a possible check on shortcomings we fear may develop in

the usual valuation method focusing on market values." VT further argues that B&M has misplaced reliance in these decisions which concerned the transfer of carriers' *entire interests* in railroad assets. VT argues that B&M improperly fails to account for the retention by B&M of an interest in the line and that distinction is crucial because OCLD measures the *entire net cost* of an interest in the railroad asset.

B&M also relies on *Amtrak and the Texas and Pacific Railway Co., Use of Tracks and Facilities and Establishment of Just Compensation*, 348 I.C.C. 645 (1976). However, Amtrak points out that this case has been superseded. In 1976, the Commission determined in this case that just and reasonable compensation was equal to a rental charge based on original cost; however, as Amtrak points out, in 1978, Congress specifically amended § 402(a) to specify that the incremental cost standard would apply to the use of tracks and facilities of a railroad by Amtrak. This standard was upheld in *Metropolitan Transportation Authority v. I.C.C., supra*, as being consistent with the Fifth Amendment and, thus, superseding the Commission's 1976 decision.

Finally, B&M argues that, pursuant to the 1930 trackage rights agreement, CV is required to pay annually an amount equal to 3% of the book value of the entire line between Brattleboro and Windsor, which is currently assessed at approximately $10.2 million, and CV has continued to pay and it has charged rent on this basis without complaint for over 50 years. Both Amtrak and CV dispute the $10.2 million figure advanced by B&M and argue that this alleged present book value is unsupported and unwarranted as the OCLD because B&M fails to connect the 1930 stated value of the line of $6,065,170 with the present value of the line listed at $10,161,888. They also contend that the 1930 agreement fails to indicate that the $6,065,170 valuation is even based on OCLD. Amtrak further argues that $10.2 million figure has not been revised

upward or downward since 1983 and therefore plainly has not been subject to depreciation and that when a rail line like the line at issue has experienced physical deterioration beyond the point provided by normal depreciation allowance, further deduction for deterioration is required. *Valuation Proceedings*, 445 F. Supp. at 1030. MA also argues that B&M has provided no evidence correlating the 1930 value to the gross investment and accumulated depreciation value reported by B&M to the Commission in its Annual Report Form R-1, which B&M should have used to develop the OCLD. In fact, MA argues that the $10.2 million figure for the 48.8-mile segment is not credible as it would represent 17% of the entire B&M system with a calculated 1987 OCLD value of $60.5 million based on B&M's 1987 Annual Report Form R-1 data. MA states that B&M's 1987 average OCLD per mile ($45,180) multiplied by the 48.8 miles of the line at issue equals a maximum OCLD of $2,204,784 for the line at issue, which should be lower at the present time because of the current condition of the track and lack of recent investment in the line.

2. *Replacement Cost New Less Depreciation.* In its definition of RCNLD, which measures the cost of acquiring or rebuilding the rail property, less depreciation, MA explains that "replacement cost" is the cost of replacing the same facilities without accounting for technical change since the date of original construction and "replacement cost new" computes the cost of providing the same service using current technology. MA cautions that RCNLD may wrongly result in a measure of the possible value to the buyer rather than the amount necessary to indemnify the seller.

While B&M has not selected RCNLD as a method for this case, it argues that RCNLD should be taken into consideration when establishing FMV under a NLV approach to account for certain major assets like bridges and signals needed by CV to operate the line. Under the OCLD

approach these assets would be valued and B&M asserts it would be properly compensated, but not under a NLV approach in which these assets would be valued at zero because the salvage value would be offset by removal/ disposition costs. If these assets are not acquired by CV, B&M argues that CV would have to replace or build these needed bridges at a RCNLD of $6.3 million and signals at a RCNLD of $3 million. However, Amtrak contends that the addition of any value is simply unwarranted. Amtrak asserts that the signal system has no separately identifiable value and would either be accounted for or have no utility, and thus no value, in each of the valuation methods in the record.

Moreover, Amtrak argues that RCNLD is inapplicable in establishing a value for railroad lines condemned for continued operations. MA adds that RCNLD and OCLD are methodologies for asset valuation for regulatory purposes, such as determining revenue adequacy or a maximum reasonable rate. As with OCLD, MA states that RCNLD may be viewed as the maximum upper limit for just compensation.

3. *Comparable Sales.* The CS methodology, as explained by MA, seeks to appraise the property by imputing a price by reference to an arm's length sale (*i.e.*, not involving a taking by a public agency) of a similar property. However, MA states that CS is simply one method for estimating either GCV or NLV. Amtrak argues that CS is an inappropriate method of valuation because no two lines of railroads are identical and that there is no transaction sufficiently similar in geographic, commercial or physical attributes to the taking here proposed. Amtrak states that the use of the CS methodology requires: (1) sales shown to be reasonably similar to the subject property; and (2) adjustments as necessary to reflect differences between the circumstances and conditions of comparable sales and sales of the property being valued.

B&M contends that, if the difference between two sales are minimal or may be explained, evidence of one sale may be introduced on the question of the valuation of the other property. While arguing that CS is irrelevant here where valuation is for non-rail use, B&M also argues that comparable sales do exist. B&M points to a 1974 transaction in which Maine Central Railroad Company (MEC) solds its Mattawamkeag-Vanceboro line in Maine to CP who had trackage rights over the line and owned adjoining segments such as here. MEC also retained trackage rights over the line. B&M inflates the 1974 sales price to 1988 dollars resulting in a value of $190,000 per mile which values the 48.8-mile subject line at approximately $9.3 million. B&M also contends there are a number of comparable sales of lines of railroad in which the purchase prices ranged from $70,000 to $90,000 per mile and, if used to value the subject line, the FMV would range from $3.4 million to $4.4 million.

Amtrak argues that B&M's inflation of the sales price is unsupported by the record and that it contradicts B&M's table showing no upward trend in per-mile prices during the period of the sales. Furthermore, Amtrak and VT argue that B&M failed to show that the sales are comparable. Amtrak points to numerous factors relevant to comparability that B&M failed to mention regarding the 1974 MEC-CP sale. VT contends that the vintage of the 1974 sale and the many changes occurring over time to competitive factors that affect the railroad industry undermine the claim that the sale is comparable. VT further argues that B&M failed to restrict all of its comparisons to sales where the seller retained trackage rights or other substantial interests.

Amtrak argues that B&M has simply dumped into the record the barest summary of a number of sales in a variety of places, times, and circumstances. Amtrak points out that B&M has failed to mention two subsequent sales by MEC, a 23-mile segment between Beecher Falls, VT

and North Stratford, NH, which sold for $310,000 ($13,748 per mile) and a 11-mile segment between Coos Junction, NH and Waumbek Junction, NH, which sold to B&M itself for $100,000 ($9,090 per mile). Amtrak contends that the characterizations of these segments appear to more closely resemble the Conn River Line and so their per-mile values should also.

4. *Going Concern Value.* Amtrak submits an estimated GCV of $531,122 and argues that GCV is the most appropriate general method to measure the just compensation to B&M for its property interests in the line at issue. Amtrak defines this income approach as constituting the net present value of the future stream of pre-tax earnings which logically can be associated with this segment of the Conn River Line. Amtrak states that to measure properly the effect of taking, it is appropriate to measure the change in the income stream occasioned by the loss of the interests, and therefore in this proceeding, Amtrak compares revenues and expenses *before* the taking with those which will be obtained *after* the taking. B&M argues that Amtrak's approach is inappropriate and unworkable and flawed with specific errors in valuation inputs; however, B&M submits that a correct application of Amtrak's approach would lead to a valuation of approximately $4.4 million.

B&M argues that Amtrak's "before and after" valuation approach is not the GCV method as used in eminent domain theory or as used by the Commission, but rather as used in valuing "partial" takings. B&M contends that here it is neither necessary nor useful to use such a method when an entire asset (such as a railway line) is taken and a partial interest in the asset (such as trackage rights and rights to fiber optics easements) is left with the condemnee, especially since each item taken or left is a separate asset capable of separate valuation. Even if separate valuations can be made, Amtrak points out that it is improper to estimate a property's value by adding up separate values for various components or elements of value under

eminent domain law. Furthermore, Amtrak, along with VT, argues that this case only involves a partial taking. Amtrak contends that a taking of B&M's entire system would not be authorized, since B&M's entire system is not required for intercity passenger service and therefore the "before and after" approach would be required. VT points out that B&M will retain trackage rights, the exclusive right to serve existing shipper facilities on the line, the exclusive right to interchange with the Claremont and Concord Railway at Claremont Junction, NH, both existing and future interests in fiber optics leases on the line, and thereby will surrender only part of its interest in the line.

Under the particular circumstances of this case, B&M argues that Amtrak's "before and after" valuation is inappropriate because B&M's starting value here would be a net loss, not income, that would result in B&M owing a debt to Amtrak instead of being compensated for the condemnation of all its property. Amtrak contends B&M's argument is irrelevant and that GCV is recognized as applicable where a business is losing money. B&M also argues that the sensitivity of Amtrak's methodology combined [illegible] the unpredictable income from the subject line will [illegible] ssure an extremely speculative GCV. Amtrak argu[illegible] all the valuation methods depend on subjective judgments and opinions, not just GCV.

5. *Net Liquidation Value.* B&M submits an estimated NLV of $5.7 million and argues that NLV is the minimum amount that is constitutionally required to be awarded to B&M for the Conn River Line. Under this approach, B&M states that the valuation of the property is made using the assumption that the property will no longer be used for rail purposes, but rather will be sold for its highest and best use. Amtrak made no estimate of NLV in its initial submission, but it submitted an estimated NLV of $1,504,930 in its reply. Amtrak, supported by MA and VT, argues that NLV is not an appropriate option here where non-rail use of the Conn River Line is prohibited by the

existence of CV's trackage rights. MA argues that NLV assumes the carrier can successfully abandon rail service.

In response, B&M argues that: (1) abandonment may be granted even if CV continues to operate; (2) B&M could terminate the trackage rights and the Commission could fix terms for CV's continued operations; and (3) B&M would be able to make a strong showing of entitlement to an abandonment. However, B&M maintains that under 49 U.S.C. 10910 no showing is required that an abandonment would be granted or would in fact be filed. Under § 10910, B&M contends that NLV becomes the minimum just compensation because the rail line is listed for abandonment by the owners. Moreover, B&M claims that, in Finance Docket No. 30893, *National Railroad Passenger Corporation—Conveyance of Conrail Line in Wayne County, MI (Wayne County)*, the Commission instructed the parties in that § 402(d) proceeding to be guided "with respect to evidence regarding compensation" by Commission decisions for sale of rail lines under 49 U.S.C. § 10905. B&M argues that § 10905 establishes a price not below FMV and FMV has been determined to be not less than NLV.

VT argues that B&M's assertion that 49 U.S.C. §§ 10905 and 10910 establish NLV as the minimum permissible compensation for sales of lines slated for abandonment or included in the "Feeder Line Program" is inapplicable to this proceeding. Those provisions are particularly irrelevant here VT claims because B&M is neither liquidating nor surrendering its entire interest in the line and, thus, NLV would overcompensate B&M who will retain trackage rights and other interests that otherwise would be extinguished if the line was liquidated. Furthermore, Amtrak contends that no Commission precedent requires the use of NLV and that the *Wayne County* case neither suggests nor requires a particular method.

B. The Appropriate Methodology.

Although the Supreme Court has not laid down fixed rules or prescribed methodologies for determining just compensation, "[f]air market value has normally been accepted as a just standard." *United States v. Commodities Trading Corp.*, 339 U.S. 121 (1950). From the condemnee's perspective,[11] the market value is the highest price he or she could obtain for the property. *United States v. Miller, supra*, and *New York, N.H. & H.R. Co., 1st Mtg. 4% B.C. v. United States*, 305 F. Supp. 1049, 1059 (1969).

Based on our examination of the evidence of record and the arguments of the parties in this proceeding, we reject OCLD, RCNLD, and CS as unacceptable methodologies for use here to determine just compensation. OCLD does not relate to the current market value of the line since original cost is not a reliable indication of the current worth of a business entity. Moreoever, B&M has failed to substantiate that its figure of $10.2 million is in fact the OCLD of the line and has not provided us with sufficient information to formulate a reliable restatement of the value of the line based on this methodology. Indeed, the record shows that the line is currently in a highly deteriorated condition indicating insufficient maintenance over the years, thus rendering the use of OCLD particularly inappropriate where the proponent has failed, as here, to make any adjustment for excess deterioration. For the same reasons, the RCNLD is not appropriate here. Additionally, no party has even attempted to value the line using RCNLD methodology. B&M has valued a few of its interests allegedly using this methodology and added those amounts to its figure for NLV. However, this mixing of methodologies has not been supported with sufficient evidence. Finally, with respect to CS, we find that the parties have failed to demonstrate that the line sales relied upon are in fact comparable to

[11] The property must be valued by the loss to the owner, not its value to the taker. *United States v. Miller*, 317 U.S. 369, 375 (1943).

the subject transaction. While the 1974 MEC-CP sale submitted by B&M superficially resembles the sale here, B&M has failed, *inter alia*, to show or even discuss: (1) the amount of real estate involved in the sale; (2) the volume of traffic on the line; (3) the physical condition of the line; (4) the terms of the trackage rights agreements predated and followed the sale; (5) whether CP has any unusual reason for continuing service over the line; and (6) whether the price paid was cash, and if not, the cash equivalent.

NLV and GCV, however, are both appropriate methodologies to use in this proceeding to arrive at a determination of just compensation for Amtrak's taking of the rail property here. The two principal, though not exclusive, competing uses for railroad lines are for liquidation and for continued rail operations. Where the most profitable use of the line is to scrap the rail and ties and sell the underlying realty, then the market value of the line is the NLV. But where the line is worth more if it is used for continued rail operations, then GCV is ordinarily considered to be the proper measure of market value (unless of course there is a more valuable use). Amtrak, and parties in support, contend that GCV is the appropriate method for valuing its taking, while B&M argues that NLV represents the constitutional minimum for the line. We conclude that the higher of the GCV or NLV constitutes just compensation here.

The Commission has consistently used NLV and/or GCV as standards for determining what would be a fair market value of rail lines that are being conveyed, not in the market, but by Commission order. In conjunction with abandonment cases, the Commission has interpreted the "fair market value" language of 49 U.S.C. 10905(f)(1)(c) to mean NLV or GCV, whichever is greater. *See* 49 CFR 1152.27(h)(6). Only rarely have carriers argued that GCV exceeds NLV, perhaps because the very purpose of filing the abandonment application is to redeploy underused assets in a more valuable use. Thus, liquidation, not contin-

ued rail service, is admitted by the carrier to be the highest use. We would expect that lines with GCV greater than NLV would be sold to other companies under § 10901 or 11343 rather than abandoned.

Consistent with condemnation principles generally, the Commission has refused to allow consideration of "hold-up value" in § 10905 sales. In one case, a railroad argued that its property was worth more in the hands of the beneficiary of the forced sale than it was worth as scrap. The Commission rejected that argument in *Chicago and North Western Transportation Co.—Abandonment Between Ringwood, IL and Geneva, WI*, 363 I.C.C. 956 (1981), and the court affirmed in *Chicago and North Western Transportation Co. v. United States*, 678 F.2d 665, 668-669 (1982).

But the court also made clear that a higher GCV would not be an appropriate standard unless there was a market for the line for continued rail use irrespective of the peculiar needs of the offeror, who was only able to make an offer for the property because of a subsidy by a local government. No applicant in an abandonment case has been able to demonstrate, to our knowledge, that GCV exceeds NLV, so that the NLV standard has been applied in all cases.

Under § 10910, the "Feeder Line" provision, Congress has specifically defined "constitutional minimum value" for lines taken under that provision as "not less than the net liquidation value of such line or the going concern value of such line, whichever is greater * * *." Section 10910 is more closely analogous to § 402(d) than is § 10905 because it allows the taking of *any* line of railroad, not just those lines slated for abandonment, as Amtrak contends. Section 10910(a)(2)(B).

This is a case of first impression. The Commission has not adopted a single standard for § 402(d) takings and we do not believe it would be appropriate to do so. Although

it might be appropriate to use NLV as a floor, there may be cases where § 402(d) is used to take rail lines that would have substantial market value as going concerns. Thus, NLV would not be an accurate gauge of fair market value in those cases. Moreover, § 10905, pursuant to which NLV has been used exclusively to value takings in the past, covers a narrow class of cases, because it applies only to lines authorized for abandonment. However, § 10910, as previously mentioned, is closely analogous to § 402(d), because it can apply to all rail lines (active or slated for abandonment). That section contains a test, NLV or GCV whichever is higher, that we believe is analytically sound, and is the test we will adopt to determine just compensation in this proceeding.

Amtrak contends that the Commission may not lawfully apply an NLV standard to assess the value of this line because B&M could not abandon and liquidate it. Amtrak believes the existence of the trackage rights agreement between B&M and CV could be used to block B&M from abandoning this line indefinitely, even if GCV drops well below NLV. This argument proves too much because Congress itself has used NLV as a floor under § 10910, which applies to all lines of railroad, not just those slated for abandonment. Congress' interpretation of just compensation is presumptively a lawful one. Accordingly, we are clearly justified in applying the same standard under § 402(d) in a similar context.

Thus, we will set just compensation for Amtrak's taking here at NLV or GCV, whichever is higher.

C. Calculation of Net Liquidation Value.

NLV is derived from three components: 1) gross salvage value of track and materials on the line; (2) cost of removal of the track and materials; and 3) value of the real estate. B&M calculates the NLV to be $5,680,155 as follows:

Gross Salvage	
Relay rail and other track material (OTM)	$2,447,500
Relay road ties	475,040
Scrap rail and OTM	184,340
Scrap road ties	181,195
Total Gross Salvage	$3,288,075
Cost of Removal	907,920
Total Net Salvage	$2,380,155
Land at Current Cost	3,300,000
B&M's Net Liquidation Value	$5,680,155

Although Amtrak maintains that NLV is not an appropriate methodology, Amtrak has submitted an estimate for NLV of $1,504,930. In general, Amtrak's estimate of NLV is a modification and correction of the evidence submitted by B&M, and is as follows:

Gross salvage	
Relay rail and OTM	$1,379,180
Relay road ties	160,000
Reroller rail and OTM	651,000
Scrap rail and OTM	159,510
Scrap road ties	183,950
Total Gross Salvage	$2,533,640

Cost of Removal	
Rail and OTM	$678,720
Ties	301,520
Freight charges	212,070
Road crossing restoration	16,000
Total Cost to Recover	$1,208,310
Net Salvage Value—Track	$1,325,330
Net Salvage Value—Bridges	(103,600)
Net Salvage Value—Sig. & Comm.	(23,000)
Total Net Salvage	$1,198,730
Land at Current Cost	306,200
Amtrak's NLV	$1,504,930

While the parties agree that NLV is the net salvage value of track and materials (gross salvage value less the cost of removal) plus the FMV of the land for the property to be taken, substantial differences exist between B&M and Amtrak in their actual NLV calculations. As discussed below, these differences are due, in part, to B&M's erroneous assumption that real estate outside the right-of-way for the line is being acquired and also due to Amtrak's finding of flaws in B&M's calculations resulting in overstatements of the gross salvage and FMV of the land and understatement of the cost of removal. For the most part, Amtrak's corrections are warranted. Based on the evidence of record, we find the NLV of the property subject to the taking to be $1,843,600.

1. *Gross salvage*. Although B&M acknowledges CV owns Windsor Bridge (0.72 miles), Amtrak points out that B&M improperly included the 0.7 of a mile of CV-owned track in the valuation of B&M-owned track. Amtrack contends that B&M, by including this 0.7 of a mile in its NLV study, overstates both gross salvage and cost of removal by including assets already paid for and owned by CV. Using B&M's own prices, costs, and classifications, Amtrak calculates that B&M overstated gross salvage by $38,500,

cost of removal by $10,500, and net liquidation by $28,000 for this track. B&M improperly included this track segment, and we will, therefore, adopt Amtrak's restatement deleting value for this segment.

Amtrak also claims that B&M overstated rail and OTM values by failing to note that B&M's track charts did not agree with trackage actually on the ground. The impact of this disclosure was to include passing siding tracks across the West River Bridge that no longer existed. During field inspections, Amtrak noted that the bridge only carries a single track and that the passing siding track ends just south of the bridge. Amtrak contends that, because B&M failed to adjust the passing siding lengths shown on the track charts, B&M's passing siding inventory was overstated, which results in B&M's overstatement of its gross salvage by $55,000, cost of removal by $15,000, and net liquidation by $40,000. The record shows that Amtrak conducted a thorough field inspection as opposed to B&M's cursory inspection and reliance on records. Thus, we will also exclude this challenged trackage from valuation here.

Based on the three work sheets submitted by B&M during discovery, Amtrak contends that B&M's entire field inspection was apparently done in one day. According to Amtrak, B&M's inspection was also apparently done by a visual or "eyeball" inspection of conditions at sample locations rather than by making precise measurements of the physical conditions of rail and track at the sample locations. Amtrak explains that buyers of rail classified as fit or reusable for railroad use have stringent requirements that must be met by prospective sellers, and to classify the rail properly, the level of wear must be ascertained through detailed measurements of the sample rails. Amtrak states that its field inspections were made using that procedure and level of detail and required 4 man-days. Based on its inspection, Amtrak contests B&M's rail classifications. Amtrak contends that its rail measurements

support the conclusion that 3,577 gross tons of rail are suitable for classification as reroller rail, a classification neglected by B&M. The reroller rail classification falls between fit/reusable rail and scrap rail, and commands a lower price than fit/reusable rail, but a higher price than scrap rail. Based on a price of $140 per gross ton quoted in late May 1988 for reroller, Amtrak calculates the gross salvage value of the reroller rail to be $500,780.

Also, in its inspection, Amtrak conducted tie count samples during which evaluations and counts were made of ties for 13 rail lengths at each sample location. Amtrak's total count of ties is 177,430 as opposed to B&M's count of 168,900. Of these, B&M counts 59,380 for railroad reuse, 51,770 for scrap/landscape purposes, and 57,750 as defective with no value. From its analysis of ties, Amtrak contends that only 25,000 ties are in fact fit for reuse and 65,695 ties could be sold for landscape purposes. Amtrak states that there has been little maintenance done on the subject line in the last several years and that B&M's own witness described the condition of the ties on the line as being poor to fair. Amtrak concludes that it is unrealistic to expect a railroad as poorly maintained as the Conn River Line to have over 35% of its ties in good enough condition to be salable for railroad reuse as projected by B&M.

Again, Amtrak conducted a thorough, on-site inspection and used appropriate methodologies in restating the number and condition of ties and the classification and value of the rail. In contrast, B&M has relied on a one-day cursory inspection. We, therefore, adopt Amtrak's restatement.

2. *Cost of removal.* Amtrak contends that B&M has accounted only for the removal of the ties that could be sold, and not all the ties on the line, as contemplated in B&M's real estate appraisal. B&M assigns no removal cost to the 57,750 ties it classified as defective and none for the ad-

ditional 8,530 yard ties pointed out by Amtrak. Applying B&M's $2.60 removal cost, Amtrak calculates an additional $172,328 of removal costs; however, Amtrak states that B&M's $2.60 average removal cost should be revised down to $1.75, as the lesser figure is a more realistic cost in a situation where all the ties are being removed. Amtrak also contends that B&M failed to take into consideration the average 20% brokerage cost associated with disposing of the ties and therefore revised downward B&M's tie prices accordingly. Amtrak notes that B&M's tie price for landscape ties still appears high, but does not further reduce the price for those ties. We agree with these adjustments proposed by Amtrak and will adopt them. In its real estate valuation, B&M assumed removal of all ties. Also, a brokerage discount is appropriate here considering the magnitude of the undertaking.

Amtrak further revised the cost of removal by adding freight charges of $212,070 for the disposition of removed track property. Amtrak also adds an allowance of $1,000 per road crossing for restoration of road crossings after removal of tracks to a smooth, usable surface in accord with State standards. Amtrak contends that B&M fails to allow for the cost of restoring the road crossings and that a total of $16,000 for the restoration is a proper deduction from gross salvage. We agree that B&M erred by not including the cost for road crossing restoration and find Amtrak's proposed cost for that item reasonable and will adopt it in our restatement. However, we reject the freight charges proposed by Amtrak for removal of track components since the removal costs per mile are sufficient to cover these expenses.

3. *Net salvage.* Based on the adjustments described above, Amtrak calculates a gross salvage value of track and materials of $2,533,640 and cost to recover of $1,208,310, for a net salvage value for track of $1,325,330. Amtrak also calculates estimates for bridges and signal and communication systems (negative because removal cost

exceeds salvage value), which B&M does not include in its NLV.

B&M notes the existence of 16 steel bridges between Brattleboro and Windsor. B&M estimates that these contain 2,800 gross tons of steel having a scrap value of $238,000 and approximate removal cost of $236,000, thus producing a negligible positive net salvage value of $2,000. However, B&M states it does not include any estimate of salvage value for any bridges, buildings, signal material, ballast, or any property other than rail, OTM, and ties. Using B&M's estimated 2,800 gross tons of steel contained in the bridges and applying to it an estimated $122 average cost per ton to dismantle the bridges, cut up the steel, and transport it to market, Amtrak calculates a removal cost of $341,600, which is $103,600 higher than B&M's estimated gross salvage value $238,000 (*i.e.* a $103,600 loss to NLV). However, Amtrak has failed to substantiate this removal cost and we find the negative net salvage for bridges to be speculative and arbitrary and incapable of firm determination. Thus, we will reject Amtrak's restatement for this item.

Amtrak further contends that B&M's NLV is flawed by failing to consider the impact of valuing and removing the signal and communication system assets. Amtrak does not agree it is proper to value signal and communication equipment at $0 for net liquidation purposes. Based on B&M's work paper, which reflects the fact that costs to remove equipment would greatly exceed any scrap value, Amtrak calculates an additional $34,000 to B&M's gross salvage, $57,000 to cost of removal, with a resulting $23,000 loss in net liquidation. Amtrak contends that the $23,000 loss is a conservative figure since it doesn't include removal of the poles or crossarms in the B&M-owned sections. We agree that there will be a net loss from the removal of B&M's old signal and communication system assets and that Amtrak has properly restated B&M's salvage value to account for that loss.

4. *Land at current cost.* B&M's land appraisers included all of the land associated with the Conn River Line and concluded the following amounts would appropriately compensate B&M for the proposed taking:

ROW (rural)	487.38	acres	$974,760
ROW (in-town)	41.83		836,600
	529.21	acres	$1,811,360
Excess land (rural)	371.03	acres	$1,484,120
Excess land (in-town)	.62		12,400
	371.65	acres	$1,496,520
Total land	900.86	acres	$3,307,880

As revised and clarified in its rebuttal testimony, Amtrak intends to acquire only that property which is necessary for rail operations.[12] Amtrak states that it has no intention of taking any excess land. Based on its appraisal, Amtrak calculates that the subject line includes 908.62 acres owned by B&M, of which 281.38 acres are excess and unneeded for Amtrak's rail operations. Amtrak states that it needs only 627.24 acres consisting of the right-of-way and additional property necessary for slope rights and culvert protection, which Amtrak computes to have an estimated FMV of $306,200.

Moreover, Amtrak contends that B&M's land appraisers lack qualifications as appraisers of property similar to that at issue here and failed to meet recognized standards of appraisal practice. For instance, according to Amtrak, the record demonstrates that B&M's appraisal was completed without sufficient familiarity with the property and without any meaningful site-specific analysis and that B&M's appraisers have no appraisal experience in the area of the subject property. On the other hand, Amtrak contends that

[12] *See* our discussion, *infra*, of terms and conditions where we condition the § 402(d) conveyance accordingly.

its appraiser, who has spent 36 years in the area, conducted a very detailed analysis for valuing land in VT, and in accordance with prescribed appraisal principles, values the property in VT at no more than $142,200. B&M's land appraisers state that, on the NH side, several interruptions in the right-of-way are caused by land held with reverters to original grantors, and Amtrak claims that reverters and limitations on title also existed in VT right-of-way land which B&M apparently failed to account for. Amtrak's appraiser agrees with B&M's appraisers that the property in NH is almost totally rural in nature. Amtrak's appraiser based its estimate of $164,000 for the 324 acres of property in NH on his review of numerous comparable sales analyzed in NH, and the specific uses of the right-of-way property. Amtrak argues that B&M's appraisal ignores the necessary adjustments for title defects, as well as for property taxes, insurance, maintenance, security and legal expenses during the period of time necessary to dispose of the parcels. Amtrak's appraiser incorporated into his evaluations a discount of 11% for 2 years to the anticipated sale date and a broker's sales commission of 10%.

We reject B&M's appraisal and accept Amtrak's appraisal for purposes of determining the FMV of the real estate here. B&M, by its own admission, has included land subject to reversionary interests. B&M has failed to demonstrate that it has marketable title to this land so it must be excluded from our valuation. B&M, however, has failed to identify sufficiently this property, so we are unable to make the necessary modifications to its appraisal. The record does not indicate that Amtrak included any property subject to reverter interests in its appraisal. Furthermore, Amtrak's appraisal is based on far more extensive on-site investigation than B&M's and B&M has failed to include any adjustment for a sell-off period as has Amtrak, due to regulatory and other delay inherent in such action of this magnitude. Accordingly, we find that Amtrak has produced a reliable appraisal, consistent with reasonable ap-

praisal principles, and we will, therefore, adopt Amtrak's valuation of the real estate.

5. *Conclusion—Net Liquidation Value.* As explained above, we reject Amtrak's proposed freight charges for the removal of track components and Amtrak's cost for bridge removal. With those modifications, we find that, based on the evidence provided, Amtrak's corrections to B&M's NLV are the best evidence of record, are reasonable, and will be accepted here. Accordingly, we find the NLV of the property subject to the taking to be $1,843,600, as follows:

Total Gross Salvage	$2,533,640
Cost of Removal	
Rail and OTM	678,720
Ties	301,520
Crossing restoration	16,000
Total Cost of Removal	996,240
Net Salvage	1,537,400
Land*	306,200
Net Liquidation Value	$1,843,600

*The current cost of land is predicated upon a two year sell-off period.

D. Calculation of Going Concern Value.

GCV is usually defined as the value of a business based on the expected profits that the business will generate in the future, *i.e.*, the net present value (NPV) of future profits. Here, however, Amtrak reasons that the only compensation to which B&M is entitled is the NPV of the annual changes in net revenue as a result of Amtrak's taking of the line. The NPV of "taking changes" represents the amount of compensation that would make the B&M "whole" (or no better or worse off) after the taking as opposed to before the taking. For our purposes here, this "before and after" approach is an acceptable variation

of the usual definition of GCV. The loss of profits as a result of the loss of the line is a fair measure here of the contribution the line is currently making.

There is substantial disagreement between B&M and Amtrak relative to Amtrak's methodology and calculations. This disagreement is largely due to differences of opinion between the two parties concerning certain future cost savings and revenue losses that would be experienced by B&M as a result of the taking. The two parties' GCV presentations also differ in their construction. Amtrak breaks cost and revenue items into many individual categories (these are depicted in the table, *infra*). Since B&M contends that GCV is inappropriate for use in this case, its presentation essentially attempts to refute Amtrak's numbers rather than submitting different ones. Moreover, B&M includes actual dollar estimates for only a few of the categories used by Amtrak.

Amtrak contends that the effect of the taking for year 1 is a "loss" to B&M of $313,082. This, it claims, is the result of an increase in operating expenses (mostly from the loss of joint facility credits which now are paid by the CV) of $277,612, a $16,483 reduction in net revenue from on-line interchange traffic from the Green Mountain Railroad, and an $18,987 reduction in rent income. Losses of declining magnitude are forecast by Amtrak for years 2 through 5, while gains of relatively smaller magnitude are estimated for years 6 through 20. The NPV of the changes or compensation due to B&M is calculated by Amtrak to be $531,122.

The Amtrak GCV procedure examines incremental gains and losses that would result from the taking to determine the amount of necessary compensation. Amtrak provides data showing how each of various cost and revenue elements are affected by the taking during the first year. It also provides some estimates of what will occur during the subsequent nine years following the first one. The results

for years 11 through 20 are based on those for the tenth year and assume that these tenth year results will remain constant. For the fist year after the taking, Amtrak's numbers, as developed by its consultant, R. L. Banks, in its June 28, 1988 filing, are modified by accepting certain of the adjustments proposed by B&M. The discount rate used to develop the NPV is 11.6%—the 1987 railroad industry cost of capital rate developed in *Railroad Cost of Capital—1987*, 4 I.C.C.2d 621 (1988).

In our GCV analysis, we have considered CV's current $300,000 (approximately) per year trackage rights payment to B&M as income and the maintenance obligation as an expense. The evidence of record is insufficient to determine exactly what losses B&M would occur from the loss of all traffic moving over the line were it not to accept Amtrak's proposed trackage rights agreement or a negotiated agreement. Yet, to ensure just compensation for the taking under a GCV approach, we must include this aspect. The $75,000 annual charge incorporated by Amtrak in its trackage rights proposal whereby B&M would allegedly not lose any significant amount of this traffic is the best estimate of the impact on B&M. In view of the failure of the record to provide a complete estimate for losses B&M would incur from traffic lost due to the taking of its line, the $75,000 annual payment cap constitutes a reasonable, amortized surrogate representing the lost traffic to B&M. Amtrak contends that this is an underestimate of the value of the trackage rights granted back to B&M. If this is true, then B&M presumably will accept the trackage rights thereby limiting its loss to $75,000 per year. If, on the other hand, Amtrak is wrong, then B&M may turn down the trackage rights. In that case compensation based on Amtrak's $75,000 offer would be excessive. In neither case would B&M be harmed.

To implement this approach, we will require Amtrak to negotiate exclusive trackage rights with B&M at a figure no higher than the $75,000 here offered. Beyond this, the

terms of trackage rights that Amtrak/CV propose to give back to B&M (after CV acquires the property from Amtrak) are excluded from the compensation analysis. This is a separate transaction, and there is no basis on which to conclude that B&M would actually consummate the trackage rights or that the terms proposed are reasonable. Moreover, the proper focus of the compensation decision is upon the value of the property at the time it is taken. *Antoine v. United States*, 710 F.2d 477, 479-80 (8th Cir. 1983), quoting *United States v. Creek Nation*, 295 U.S. 103, 111 (1935). Our surrogate valuation of $75,000, as supplemented, allows us to meet this standard in determining GVC for the taking here.[13]

We have analyzed the evidence of record and have developed an estimated GVC for the lines Amtrak would acquire of $2,373,286. Our calculations to obtain this figure are as follows:

---

[13] We are unaware that the ceiling on maintenance charges to B&M under the proposed trackage rights agreement may increase if traffic is substantially increased. However, Amtrak revised its trackage rights proposal to apply the $75,000 cap to traffic levels that moved over the line prior to the rerouting of certain D&H traffic. Thus, this cap should be an accurate reflection of all the traffic that moved over the line.

TABLE I

First Year Net Revenue Loss/Cost Improvements in Perpetuity

Changes in Net Revenues—Expenses	
Signals & Interlockers	(6,876)
Depreciation	(63,294)
Joint Facility Credit	334,577
Repair & Maint. (Other (*see* Table II)	
Total Way & Structures	264,407
Other Rents (Debit)	(3,827)
Transportation	
Engine Crews	(2,253)
Train Crews	(3,847)
Dispatching Trains	(5,240)
Fringe Benefits	(2,133)
Total Transportation	(13,473)
Property Taxes	(12,423)
Net Increase RW Operating Expenses	234,684
Changes in Net Revenue—Local/Interchange Revenue & Rent Income	
Freight Rev On-Line Interchange	75,265
Freight Op Exp On-Line Interchange	(58,782)
Net Rev From Opns On-Line Interch	16,483
Local Lost Traffic Revenue	23,334
Misc. Leases	18,987
Lost Revenues (Less Costs)	
	58,804
First Year Losses Requiring Compensation	
Increased Operating Expenses	234,684
Lost Revenues	58,804
Total	293,488

Computation of GCV	
NPV of Total First Year Losses Requiring Compensation in Perpetuity*	2,530,069
Add Back Dispatching (48,940 per year)	
NPV of Dispatching in Perpetuity	421,897
Subtract Maintenance Cost Savings	(578,680)
TOTAL NPV IN PERPETUITY	2,373,286

* Computed by dividing first year losses by the 1987 railroad industry cost of capital rate (11.6%).

TABLE II

Computation of Maintenance Cost Savings

Year	Revenue Foregone (Note 1)	New Payments (Note 2)	Cost Savings (Note 3)	Total	Present Value of Total
1	117,278	142,680	(217,029)	42,929	38,467
2	137,053	142,192	(253,623)	25,622	20,572
3	156,828	141,703	(290,217)	8,313	5,981
4	176,602	75,000	(326,812)	(75,209)	(48,486)
5	196,377	75,000	(363,406)	(92,029)	(53,162)
6	216,152	75,000	(400,000)	(108,848)	(56,342)
7	216,152	75,000	(400,000)	(108,848)	(50,486)
8	216,152	75,000	(400,000)	(108,848)	(45,238)
9	216,152	75,000	(400,000)	(108,848)	(40,536)
10	216,152	75,000	(400,000)	(108,848)	(36,323)
Sum of First 10 Years					(265,553)
Savings After Year 10 in Perpetuity at 11.6%					(313,127)
Sum of Savings					(578,680)

Note 1: Represents 54.038% of maintenance costs (shown as savings) that the CV would otherwise have paid to B&M. This percentage figure was developed by Amtrak.

Note 2: Represents what the B&M would pay for maintenance in connection with its use of the line if owned by the CV. Figures are from Amtrak.

Note 3: First year figure from Amtrak. Sixth year and later held constant at $400,000. Years 2 through 5 are extrapolations on a straight line basis between the year 1 and year 6 figures.

With one exception, we have not used either Amtrak's or B&M's data for years subsequent to the first year after the taking. Instead, we have assumed that later years are similar to the first year. It is generally difficult to project

such figures for even a 1 year *pro forma* period, let alone a 10 year one. Neither Amtrak nor B&M has provided sufficient justification for estimates of changes that would occur for the subsequent years. The exception that we have incorporated is an adjustment for maintenance costs, discussed in more detail later in this analysis. Consequently, all of our figures (including any B&M adjustments) except for maintenance costs are based exclusively on results for the first year after the taking. Our analysis of the various cost and revenue elements which are subjects of contention in the GCV presentation is set forth below.

1. *Track maintenance expense.* Amtrak contends that annual track maintenance expenses that B&M would avoid as the result of the taking would vary from slightly over $4,400 per track mile in the first year to $11,000 per track mile for years five and after. B&M, in its rebuttal, makes no statement to disclaim the figures for the first five years but does argue that the $11,000 per track mile (per year) figure for years six onward is overstated by $3,000, mainly because Amtrak has indicated elsewhere that the maintenance cost for CV would be about $400,000 per year to maintain the line at Class II standards (25 mph) after rehabilitation.

We have accepted B&M's argument relative to maintenance expenses being overstated and: (1) used $400,000 in lieu of $536,000 per year from years six onward since that is the figure submitted by Amtrak for CV; (2) adjusted annual cost savings by using a straight line extrapolation between the figure for year one and the figure of $400,000 for year six (the same method used by Amtrak in its calculations); (3) adjusted revenue foregone (CV's share of maintenance expense if B&M continued to operate the line); and (4) incorporated new payments that B&M would make for its share of maintenance expenses under the proposed trackage rights agreement. These changes result in a NPV of maintenance costs taken in perpetuity equal to a savings

to B&M of $578,680; *i.e.*, they reduce the GCV by that amount. *See* Table II above.

B&M also contends that some of these maintenance costs would be capitalized. To the extent that the book value of the line would increase through a specific capital program or the projected maintenance expenditures, the amount of rent payable by CV would increase correspondingly. Since B&M receives a rental payment from CV equivalent to 3% of the book value of the line, B&M argues it would lose 3% of the capitalized costs. B&M fails to elaborate on any specific capital program and fails to include any evidence that some portion of the projected maintenance expenditures would be capitalized. Amtrak contends that the projected annual maintenance expenditures would encompass the essential work to cure the many day-to-day routine defects arising on the property and, because none of the work is projected to be of a nature enduring more than a year, none of the maintenance expenditures is expected to be capitalized. We agree with Amtrak's analysis that these maintenance costs would be expensed rather than capitalized and therefore find no projected lost rental payments and make no adjustment for such in the NPV.

2. *Dispatching expenses.* Amtrak contends that annual dispatching expenses could be reduced by $48,940, the cost of one dispatching position, if B&M no longer has this line segment. With transfer of dispatching control to CV, Amtrak argues that it appears reasonable that reassignment of B&M dispatching duties after transfer would allow reduction of five dispatching shifts per week (one position). Amtrak argues that since B&M consolidates its dispatchers at North Billerica, MA, there "surely [are] enough [dispatchers] to allow consolidation." B&M maintains that not even one position can be consolidated through workforce redeployment. B&M argues that no savings will be realized since it will operate more trips on the line than the single round trip postulated by Amtrak.

Amtrak fails to justify the elimination of a dispatcher. The elimination of ownership of one 48.8 mile segment while possibly still operating trains over that segment as the result of trackage rights is not justification for the elimination of a dispatcher. We support B&M's position relative to this issue and add back the annual cost of that dispatcher ($48,940) in perpetuity at 11.6%, resulting in an addition to the NPV of the GCV of $421,890.

3. *Traffic losses.* B&M contends that it would lose approximately 1,000 carloads of traffic per year with an annual gross revenue to B&M of $700,000 as a result of the taking due to the loss of local traffic from competition with CV. Amtrak contends that the modified trackage rights proposed to be given to B&M would preclude the loss of local traffic and that its modified proposal to permit B&M access, through reciprocal switching at reasonable rates, to new facilities which may locate on the segment would put B&M in a superior position after the taking vis-a-vis its present predicament.

We have discussed this matter in general terms *supra.* In addition to using the $75,000 figure to reflect lost traffic, CV will also now compete for some local traffic. The amount of these losses, however, should be relatively small, since B&M may choose trackage rights to maintain the carrying of local traffic and also have access to new facilities at reasonable reciprocal switching charges. To compensate for these particular losses, we have also used B&M's estimate of net revenue losses for year one ($23,334) and have computed the value of lost revenues by taking this figure at 11.6% in perpetuity, which produces an amount of $201,156 to be added to the GCV.

4. *Loss of control.* B&M contends that delays it would experience as a result of the loss of control of the line would result in substantial costs. B&M claims that it is difficult to quantify discrimination in train dispatching where it is necessary to delay one railroad's train or the

other's train because the variables are numerous and therefore challenges the figure presented by CV for the number of CV trains delayed by B&M trains allegedly due to discrimination. Yet, from this amount, B&M takes 25% to derive its own projected amount of loss ($94,200) due to discriminatory delays. B&M further claims that Amtrak has not addressed the issue of loss of train control.

Amtrak denies B&M's charges, arguing that increased line speed as a result of improved track conditions would more than offset any delays resulting from the taking. Amtrak argues that B&M seized upon this opportunity to generate invalid numbers and ignored the important explanations that the CV delays were due primarily to the slow track speed and that dispatching delays were primarily track caused. Amtrak therefore contends that, compared with the increased hours required to traverse the entire 48-mile line, the dispatching delays for CV trains are merely a small fraction of the 25% advocated by B&M and insignificant compared with over-the-road delays caused by slower track speed. As for the issue of loss of train control. Amtrak argues that it has not only addressed this issue but has also quantified the dollars involved with this loss of control and included this figure ($69,411) in its NPV estimate. B&M does not quantify the loss of line control.

B&M has merely chosen to take a 25% portion of the CV delay due to dispatching without any rational basis. We conclude that the savings to B&M that would result from improved track speeds could offset increased costs caused by any delays. Furthermore, we find that Amtrak has adequately factored B&M's loss of control into its annual cost figures. Finally, to the extent B&M accepts trackage rights and can show in the future that it has been discriminated against in dispatching, it has a separate remedy under the statute. We therefore make no adjustment to the GCV for loss of traffic control.

5. *Real estate sales.* B&M argues that the property included in the taking would contain certain parcels that are not necessary for railroad usage. B&M contends that there are 371.65 acres of land outside of the right-of-way with an aggregate value of approximately $1.5 million. B&M argues that it should be entitled to compensation for the loss of revenue that would result from not being able to sell this property. Amtrak claims that it is only taking that property which is necessary for rail operations (627.24 acres) and that all property in excess (281.38 acres) will remain in B&M ownership, so that no loss of sales revenues will result.[14] Amtrak contends that the 627.24 acres proposed to be taken consists of the right-of-way property and the additional property necessary for slope rights and culvert protection. After examining the evidence, we find that the evidence does not support a finding that B&M will suffer foregone real estate sales revenues of its excess, non-rail, right-of-way property along the Conn River Line since Amtrak is only taking that property necessary for rail operations, and we therefore make no adjustment to the GCV.

6. *Leases.* B&M indicates that it could sell additional easements for fiber optics over the next 10 years. It contends that the value of such future easement sales should be included in the computation of GCV. B&M also claims that, in addition to its fiber optics easements, revenues ($19,000 per year) from other routine pipe, wire, and property leases that would be foregone have not been included by Amtrak. B&M further contends that this revenue loss should increase in future years as use of real estate becomes more valuable.

Amtrak contends that it already has added B&M's revenue loss in property income each year in the NPV calculation advanced in its Second Supplemental Verified

[14] *See* our discussion, *infra*, of terms and conditions where we condition the § 402(d) conveyance accordingly.

Statement on Just Compensation. Amtrak also states that, in addition to excluding from the taking any residual interests in existing fiber optics leases, it will exclude from the interests acquired any future fiber optics leases that would not be inconsistent with rail operations over the right-of-way being acquired. As a condition to exercising these rights, Amtrak states that B&M is to be responsible for any costs, including those associated with delay or disruption in rail passenger or freight operations, caused by the installation or maintenance of these fiber optics cables. Since the value of existing non-fiber optics leases has been considered in Amtrak's calculations and B&M will retain the rights to existing and future fiber optics leases, we find there is no need for any additional compensation concerning leases.[15] We therefore make no adjustment to the GCV.

7. *Residual value of land.* B&M contends that, at the end of the 20-year term proposed by Amtrak, the real property in the Conn River Line would still have residual value which, when adjusted to present value, would equal at least the present value of the same real property. B&M contends that Amtrak's figures provide no residual value for the land underlying the rail and that a residual value should be assigned, discounted back, and added to the NPV of the taking.

Amtrak contends there is no reason to believe that rail use will cease after 20 years, and that it is inappropriate to assign a residual value under the circumstances. Amtrak argues that B&M provides no evidence that the continued rail use of the Conn River Line by B&M will expire in 20 years and, therefore, provides no reason to derive any residual value at an arbitrary point in time. Furthermore, Amtrak asserts that the 20-year maintenance and operating contract proposed between Amtrak and CV has no relevance to this issue.

[15] *See* our discussion, *infra*, of terms and conditions where we condition the § 402(d) conveyance accordingly.

Because we find no evidence that continued rail use will expire over the subject line in 20 years, we find it inappropriate to assign any residual value at this time. Our calculations assume that the land will continue to be used for rail purposes in perpetuity. Thus, we make no adjustment for residual value to the GCV.

E. Conclusion—just compensation.

We have found that the NLV of the property subject to the taking by Amtrak is $1,843,600. We have found the GCV of the line to be $2,373,286. Since GCV exceeds NLV here, we find that B&M is entitled to just compensation in the amount of $2,373,286 for the taking.

III. CV's PETITION FOR EXEMPTION

Having approved Amtrak's application under § 402(d) of RPSA, we now turn to the final stage of Amtrak's plan to resume its Montrealer passenger service over the Conn River Line—CV's related petition for exemption.

On April 7, 1988, CV filed a petition in the embraced proceeding (Finance Docket No. 31259) seeking an exemption under 49 U.S.C. § 10505 from the requirements of 49 U.S.C. §§ 11343-11345 and 49 C.F.R. Part 1180 to enable it to accomplish the following: (1) acquisition of all of the interests Amtrak is seeking to acquire from the B&M over the Brattleboro to Windsor portion of the Conn River Line, once Amtrak has obtained those interests under § 402(d) RPSA; and (2) conveyance of trackage rights over the line to B&M. (As to (2), we have concluded, *supra*, that the proposed trackage rights agreement will not be imposed by us but will be left to the parties to negotiate subject to the condition we imposed concerning Amtrak's $75,000 offer.)

As noted earlier, in a decision served July 5, 1988, in Finance Docket No. 31259, we gave the parties an op-

portunity to supplement the record on the competitive concerns raised in opposition to the exemption. On July 20, 1988, additional evidence on the competitive issues was filed in support of the exemption by CV[16] and VT[17] and in opposition to the exemption by B&M and CP. On July 25, 1988, replies to the additional evidence were filed by CV, Windsor, B&M and CP.

Under 49 U.S.C. § 11343, *et seq.*, a rail carrier may acquire and operate the rail property of another carrier only with the approval and authorization of the Commission. B&M and CP argue that this transaction should be subject to a full review under these statutory provisions. However, under 49 U.S.C. § 10505, we must exempt a transaction or service from regulation when we find that: (1) continued regulation is not necessary to carry out the rail transportation policy of 49 U.S.C. § 10101a; and (2) either (a) the transaction or service is of limited scope, or (b) regulation is not necessary to protect shippers from the abuse of market power.

Detailed scrutiny of the proposed acquisition under 49 U.S.C. § 11343, *et seq.* is not necessary to carry out the rail transportation policy. Exemption will promote the goals of effective competition found in § 10101a(4) and (5). B&M argues that the proposed transaction is contrary to these goals because it will adversely affect the competitive balance on the Conn River Line. Rather than a line of alternative ownership and mutual trackage rights, B&M

---

[16] On July 21, 1988, CV filed a motion for leave to file one-day late the verified statement of N.R. Cutler in support of the petition for exemption. In the interest of a complete record and since no prejudice will result, we will grant the motion and accept the statement for filing.

[17] MA and Windsor informed the Commission that they would rely on their previous filings to address the competitive concerns, but reserved the right to file replies to the supplemental evidence on July 25, 1988, in accordance with the amended procedural schedule. NH filed a statement in support of granting the exemption.

submits that the entire line will be owned and controlled by CV (in essence CN), resulting in the gradual loss of B&M's traffic base, reduction of its service, and eventual exit from the market. According to B&M, the competitive situation is further exacerbated by the June 20, 1988 bankruptcy filing of D&H, which it argues effectively eliminated the only other north-south route between eastern Canada and the United States for its parent, Guilford.

In *Guilford Transp. Industries, Inc.—Control—D&H Ry. Co., 366 I.C.C. 396 (1982), aff'd in part and remanded in part sub nom., Central Vermont Railway, Inc. v. I.C.C.*, 711 F.2d 331 (D.C. Cir. 1983), we conducted an extensive competitive analysis, which we incorporate by reference here, of the four routes, including the Conn River Line, that compete for north-south traffic. There we found, among other things, that the traffic moving over the north-south lines is potentially subject to diversion to motor carriage. We also stated that the extent to which a carrier "controls" certain traffic depends on a number of factors and that both originating and bridge carriers can, by their rates, influence shipper choices. Ultimately, we found that the extent to which any rail carrier can exercise control over traffic is greatly diminished in the face of intense motor carrier competition and that, if rail carriers want to preserve traffic in these circumstances, they cannot afford to favor inefficient routes over efficient ones, even if it means that they will not preserve their longest possible haul. These findings are equally applicable today and we adopt them. Although CP may ultimately be inconvenienced by these transactions, it has not shown that competition or service to shippers will be harmed as a result. Thus, it has not shown that this consolidation will not be in the public interest. *See* 49 C.F.R. § 1180.1(a) (Merger Policy Statement).

We do not agree with B&M that the competitive situation need worsen as a result of this transaction. If B&M accepts trackage rights, it will continue to serve its ex-

isting shippers on the Conn River Line (even with the bankruptcy filing by D&H) and may obtain access to new shippers at new facilities via reciprocal switching to be performed by CV. Thus, the competitive situation on the line may continue as before with B&M retaining the exclusive right to serve its existing customers. The fact that B&M and CV will share in the right to solicit new traffic and that CV will have access to the Green Mountain Railroad is procompetitive and should serve to increase the available transportation options. Moreover, we agree with CV and its supporters that rehabilitation of the line will enhance B&M's as well as CV's ability to provide competitive service.

If B&M does not exercise its trackage rights option, then the shippers that are now served exclusively by B&M would be served by CV instead. This would not reduce the number of rail competitors, nor would it reduce the quality of competition. In fact, Amtrak and CV have agreed to make a substantial investment in upgrading the track which is desperately in need of maintenance.

We also agree with CV that its proposed acquisition will not preclude or fundamentally alter any existing interchange arrangements on any of the north-south rail routes in the Canada-U.S. markets, nor will it prevent any such arrangements which are now possible on these routes. Shippers and other carriers, including CP, will continue to have whatever options they now have to use either CV or B&M over the Conn River Line or the alternative north-south routes. Nothing about the exemption makes any of those options less available or attractive.

Finally, we disagree with CP's claim that exemption is inappropriate here because revocation is not a realistic possibility. *See* 49 U.S.C. § 10505(d). The revocation remedy remains available just as it is in other line sales.

The exemption will also expedite regulatory decisions consistent with § 10101a(2). There is a clearly established

need for expedited action in this case. CV must be able to begin work immediately on upgrading the line in order to complete the rehabilitation before the Fall frost. In addition, the $5 million appropriated by Congress for the purpose of rehabilitating this line is available only through September 30, 1988, the end of the fiscal year.

Rehabilitation of the line will also promote a safe and efficient rail transportation system [§ 10101a(3)] and enable the carriers to operate transportation equipment without detriment to the public health and safety [§ 10101a(8)]. The need for rehabilitation of the line has been clearly established by the record and, indeed, has received the imprimatur of Congress in its appropriation of the necessary funding.

Finally, exemption will further the goal of cooperation with the States on transportation matters [§ 10101a(9)]. This transaction is supported by Massachusetts; New Hampshire and Vermont.

Based upon the above findings, we also conclude that regulation is not required to protect shippers from market abuse. Competition from railroads and motor carriers available in the area precludes such abuse. Shippers in this proceeding unanimously support the transaction. Windsor's testimony is particularly compelling in demonstrating its need and desire for additional rail carrier options.

As discussed in the labor protection portion of this decision, we will impose the labor protective conditions in *New York Dock*, as a condition to granting this exemption. As a further condition, any employees affected by any grant of trackage rights to B&M will be protected pursuant to *Norfolk & Western*.

For the environmental and energy impacts of this exemption, *see* the environmental issues portion of this decision.

IV. LABOR PROTECTION

RLEA and UTU have requested labor protection for affected employees. RLEA submits that Amtrak's acquisition of the B&M's interest in the Conn River Line will result in the elimination at least 17 positions staffed by B&M agreement employees[18]—9 of clerical positions and 8 maintenance of way positions. RLEA states that B&M has also identified five operating craft employees whose positions could be adversely affected by the Amtrak acquisition. Based on the responses to its discovery requests, RLEA contends that Amtrak has taken the position that it will not make offers of employment to any B&M employees and will not agree to the application of the employee protective conditions set forth in *New York Dock Railway—Control—Brooklyn Eastern District Terminal*, 360 I.C.C. 60, *aff'd sub nom. New York Dock Railway v. United States*, 609 F.2d 83 (2d Cir. 1979) (*New York Dock*), for the benefit of B&M employees adversely affected by this proceeding. RLEA also contends that CV has acknowledged that application of the *New York Dock* protection to employees affected by CV's acquisition of the line from Amtrak is proper and that labor protection is also due to employees adversely affected by the proposed trackage rights agreement with B&M, but CV has not specified whether it will accept responsibility for meeting *New York Dock* obligations to B&M employees adversely affected by Amtrak's purchase of the line from B&M.

RLEA argues that Amtrak's purchase of the line from B&M is a discontinuance of rail passenger service as contemplated by § 405(a) of the RPSA, which RLEA contends contains terms intended by Congress to extend employee protective benefits to employees of railroads that ceased rail passenger service operations in any fashion. RLEA claims B&M has the obligation to provide the fair and

[18] *See* Finance Docket No. 30965, *et al.*, for a discussion of the current status of employees on this line.

equitable arrangements set forth in *New York Dock* to protect the interests of its employees affected by this discontinuance, but notes that CV has indicated a willingness to assume these B&M employee protection obligations, so any concern that B&M will be burdened by additional liabilities to its employees should be dispelled.

Alternatively, RLEA argues that Amtrak's application to the Commission is a transaction subject to 49 U.S.C. § 11343 and *New York Dock* conditions. RLEA contends that any argument by Amtrak that § 402(d) provides unique procedures that preempt any application of the Interstate Commerce Act (ICA) is incorrect because there is no express language in the RPSA exempting this proceeding from procedures contained in Chapter 113 of Subtitle IV of the ICA and so the Commission must attempt to reconcile the terms of § 402(d) with Chapter 113.

RLEA submits, overall, that the CV-Amtrak conveyance cannot be viewed in isolation to the Amtrak § 402(d) application and, therefore, employee protective benefits should be applied to all B&M employees affected by this entire transaction. RLEA notes that the § 402(d) proceeding has presented a way for CV to obtain the line without engaging in direct negotiations with B&M, so the Commission must provide that the fair arrangement required by 49 U.S.C. § 11347, and by § 405 protect *all* rail employees affected by this sale, including B&M employees. RLEA contends that failure to provide employee protective benefits to those employees affected by this § 402(d) transaction would effect a taking of the property rights of B&M employees for a public purpose without just compensation and subject this sale to constitutional challenge.

CV has offered a proposed condition to the approval of its petition for exemption which addresses directly both RLEA's and B&M's concerns. CV states that it has increased its offer to hire certain B&M maintenance and signal employees who currently work on the Conn River

Line to encompass a total of five maintenance of way department employees described by RLEA. CV, however, contends that nothing about this transaction will affect those nine clerical employees and that any affect on any of these employees would be a unilateral decision by B&M for reasons unrelated to this transaction further to downgrade its service on the line or to otherwise reduce the frequency or volume of traffic moved over it. CV further disputes B&M's claim that five operating positions will be affected because B&M would ostensibly continue under trackage rights to serve existing shippers, and to provide local and overhead service on this line. Although no statute or regulation requires it, CV has offered to pay benefits equivalent to the dismissal, displacement, and separation allowances described in *New York Dock* to B&M employees affected by the conveyance of property from Amtrak to B&M and also to pay relocation expenses to B&M employees required to relocate to take a new position with CV as a result of this transaction, when the new position is more than 30 miles from their current residence. Based on its understanding of CV's offer, B&M states that its position is that B&M should be indemnified fully by CV for any and all potential labor related costs. Amtrak states that CV has offered to make these payments as a means of ameliorating any adverse impact which may occur as a result of the B&M-Amtrak transaction.

We need not address all of RLEA's arguments to resolve the matter before us and meet our statutory obligation to impose labor protection. In transactions such as this that are subject to 49 U.S.C. § 11343, we are required to impose *New York Dock* conditions. We see no need to analyze whether those conditions need also be imposed in the § 402(d) application. Imposing them in the related CV exemption will assure protection for all adversely affected B&M employees.

This does, however, create an issue of first impression. A sale between two rail carriers subject to *New York Dock*

typically results in the seller being responsible for labor protection for those in its employ who are adversely affected.[19] Certain aspects of this transaction preclude us from taking this approach here. First, there is no certainty that B&M will ultimately exercise trackage rights over the line. It has no legal obligation to do so. Thus, the extent of potential harm in B&M employees cannot be measured. Related to this is the fact B&M correctly notes that it should have no labor protection expense assigned to it. Were we to do so, we would be violating the precept of *Brae Corp. v. United States*, 740 F.2d 1023 (D.C. Cir. 1984), *cert. denied*, 105 S. Ct. 2149 (1985), that an exemption may not impose "regulation" on an unwilling party. Moreover, consistent with our takings analysis, *supra*, B&M would be entitled to full compensation were we to impose this obligation on it. As we cannot compute such an obligation, we would be adding considerable uncertainty and possibly delaying Amtrak's plans.

Moreover, this case is unlike a typical consolidation situation covered by *New York Dock*, where employees are protected as employees of a new system which is being formed. B&M will have no voice in the crewing over the property transferred. In the circumstances, there is no basis for the railroads and labor to negotiate an implementing agreement governing distribution of forces as a result of the transaction. Moreover, because this is not a voluntary transaction, there is no purpose to be served by requiring preconsummation negotiations of implementing agreements by each carrier with the affected employees. Each carrier shall negotiate an agreement subsequent to the transaction, with its employees, and each is responsible, at least in the first instance, for protecting its own employees. But we will require that CV be responsible for

---

[19] The buyer may agree to assume this responsibility in the contract of sale.

all labor protection expenses, including indemnifying B&M for its expenses.

CV employees will be protected by any exercise of B&M trackage rights under the standard conditions of *Norfolk & Western Ry. Co.—Trackage Rights—BN*, 354 I.C.C. 605 (1978), as modified in *Mendocino Coast Ry., Inc.—Lease and Operate—California Western Railroad*, 360 I.C.C. 653 (1980) (*Norfolk & Western*).

V. TERMS AND CONDITIONS

As previously described, § 402(d) empowers the Commission to order a conveyance of the B&M property interests to be acquired in this proceeding "on reasonable terms and conditions, including just compensation." In its initial application, Amtrak proposed the following terms and conditions: (1) the grant of trackage rights by CV to B&M to permit B&M to continue its rail operations without impairment: and (2) the requirement that B&M convey those interests upon a tender by Amtrak of its estimated just compensation. We will discuss these and other terms and conditions of subsequently proposed by Amtrak below.

1. *Trackage rights agreement.* In recognization of the Congressional concern expressed in § 402(d)(1)(A) regarding whether a conveyance would significantly impair the ability of the railroad being forced to make the conveyance of its line to continue to carry out its obligation as a common carrier, Amtrak has proposed that a grant of trackage rights from CV (the ultimate owner of the line under Amtrak's proposal) be imposed as a condition to the approval of its § 402(d) application. Over the course of this proceeding, Amtrak has attempted to fashion a trackage rights agreement that would result in B&M being no worse off competitively after the taking than before.

Under the agreement, B&M would have the right to continue to serve exclusively all existing shippers on the Conn River Line at the time of the transaction and any

new shippers that locate at existing facilities along the line (provided B&M maintained a minimum three day per week service along the line), and the exclusive right to interchange traffic at Claremont Junction, NH with the Claremont and Concord Railway. B&M may serve new shippers locating elsewhere on the line via reciprocal switching to be performed by CV at a rate of not more than 180% of the variable cost of providing such switching services. CV would have the right to serve new shippers locating at other than existing facilities now served by B&M and would have the right, along with B&M, now to interchange traffic at Bellows Falls, VT with the Green Mountain Railroad Corporation.

The trackage rights agreement is for a term of 20 years. However, if B&M defaults under the agreement, CV has the right to terminate and end B&M's use of the line. Also, under the agreement, CV has the right to abandon its operation over the Conn River Line by giving B&M 90 days' notice. Finally, the agreement provides that B&M will pay compensation for these rights in the form of an annual maintenance fee capped at $75,000 unless B&M's annual gross tonnage on the line exceeds 125% of B&M's 1985 traffic (*i.e.*, 26,072 carloads according to B&M). This year was finally chosen as being representative of B&M's future traffic levels, since traffic levels during 1986 and 1987 were depressed due to strikes and the diversion of CP overhead traffic to its affiliate, the D&H, which have now ceased.

Throughout the proceeding, B&M has maintained that it should be allowed to negotiate the terms of any trackage rights agreement to be imposed. B&M does agree, however, that if the § 402(d) application is approved, it must be granted trackage rights or its viability not only in that market but its entire system may be placed in jeopardy.

We find that Amtrak's offer of trackage rights is necessary to ensure, consistent with § 402(d)(1)(A) of RPSA,

that B&M's ability to carry out its common carrier obligations will not be significantly impaired, As we discussed earlier, the GCV that we have found to constitute just compensation to B&M is based on Amtrak's proposed grant of trackage rights under which B&M would be obligated to pay Amtrak an annual fee in the form of an annual maintenance fee subject to a $75,000 cap for the trackage rights. However, we conclude that it would be inappropriate to impose the exact terms of that trackage rights agreement on the parties without first allowing them the opportunity to negotiate. This is consistent with B&M's request to negotiate and with our long-standing policy of allowing the parties to agree on the specific terms of a trackage rights agreement whenever possible.

Parties may wish to adopt the proposed trackage rights agreement as is, or to negotiate different terms. As discussed earlier, Amtrak may not in these negotiations increase its demand for exclusive trackage rights to serve existing shippers at compensation of $75,000.[20] In effect, we are imposing this figure as an overall cap on what B&M may be required to pay. B&M may also refuse to enter into any trackage rights agreement. We will give the parties 20 days in which to negotiate terms and conditions for trackage rights. If the parties are unable to agree on terms at the end of the period allowed for negotiation, any party may request the Commission to set the terms and conditions for the trackage rights.

2. *Payment of estimated just compensation.* In our order finding that Amtrak is authorized to receive title, possession, and control of the Conn River Line, Amtrak has requested that we include a provision requiring B&M to convey its interests in the subject line to Amtrak upon a tender by Amtrak of its estimated just compensation to the Secretary of the Commission. This amount, plus any

---

[20] As shown in Table II, the maximum would be $75,000 in years four and beyond but about $142,000 in years 1-3.

interest, would be disbursed to B&M, or other person or persons, upon demonstration that it (they) is (are) entitled to the money, including a demonstration that there are no outstanding liens against the property at the time of payment. This would allow Amtrak promptly to begin restoration of the line pending a final determination of just compensation. Since we are making a final determination of just compensation here, we need not impose the requested term. Also, we find no need to require B&M or others to demonstrate that there are no liens outstanding against the property because Amtrak is fully capable of determining marketability of title. However, we will provide for payment and transfer of the line in this fashion: upon Amtrak's tendering to B&M of the amount we have determined to constitute just compensation here, B&M is directed to convey its interests in the line. Amtrak will have 20 days from date of service of this decision to notify the Commission in writing as to whether it will purchase the subject property interests or withdraw its application.

3. *Interest and rights excluded from the taxing.* In its argument on just compensation, B&M enumerates six additional assets, interests or rights of B&M it claims are entitled to compensation—the potential for further development of fiber optics transmission cables, income from leases and other easements or licenses, the right to control the Conn River Line by means of dispatching, the signal system necessary for such dispatching, the passenger station at Bellows Falls, and the proceeds from sales of nonrail property located along the Conn River Line. As previously discussed, Amtrak is not taking B&M's rights and interests in future fiber optics leases nor any excess nonrail property owned by B&M along the segment which it could sell. B&M's income from leases and other easements or licenses has been accounted for in the valuation and the dispatching rights and signal systems are also treated by each methodology in reaching just compensation. As for the passenger station at Bellows Falls, B&M owns a

two-thirds interest and the State of Vermont owns the remaining one-third interest. B&M states that the station is presently used by both B&M and the Green Mountain Railroad Corporation, who has recently offered to purchase B&M's interest at FMV. Amtrak states that it can make alternative arrangements for a station in Bellows Falls, and would not want to deprive B&M of those revenues.

Amtrak therefore has proposed as part of its § 402(d) application to exclude certain assets and values in the Conn River Line, which are not necessary for Amtrak to achieve its objectives in this proceeding: (a) B&M's rights and interests in existing and future fiber optics leases not inconsistent with rail operation along the right-of-way being acquired under a condition that B&M shall be responsible for any costs, including those associated with delay or disruption in rail passenger or freight operations, caused by the installation or maintenance of fiber optics cables; (b) all of B&M's right, title and interest as tenant in common or otherwise, in the railroad passenger station at Bellows Falls, VT; and (c) those 281.38 acres of property described in Appendix B to the Verified Statement of Dennis Sullivan, filed on July 13, 1988, as being outside the right-of-way. Accordingly, we will impose appropriate conditions excluding these assets from the § 402(d) taking.

4. *Amtrak's obligation post transfer*. One last item must be addressed. Through the § 402(d) proceeding, Amtrak will purchase track that has been used for freight as well as passenger service. In so doing, Amtrak will acquire the underlying common carrier obligation to provide freight service. While Amtrak intends, in effect, to transfer this obligation and the track to CV, we remind it that the obligation remains if for some reason the Amtrak-CV transaction does not occur. In turn, when the property is transferred to CV, CV will have the common carrier responsibility to provide service over the entire line, unless B&M exercises its option for trackage rights to allow it exclusively to serve the points it is now serving.

ENVIRONMENTAL ISSUES

The environmental and energy impacts of the proposed transaction have been examined by the Commission's Section of Energy and Environment (SEE) and found not to be significant and no party has claimed otherwise. Applicants have identified a depot at Bellows Falls, VT, which they believe is the only structure 50 years old or older that will be acquired in the transaction as well as four other structures in the vicinity of the line to be acquired that they believe are not owned by B&M. The information required by 49 C.F.R. § 1105.7(c)(10) has been submitted to the State Historic Preservation Officers of both Vermont and New Hampshire for the Bellows Falls depot. However, since applicants did not have B&M's cooperation in identifying potential historic properties, they will be required to supply the appropriate State Historic Preservation Officer with the information specified in 49 C.F.R. § 1105.7(c)(10) for all additional properties 50 years old or older that are discovered once the transactions are consummated and to preserve intact all sites and structures 50 years old or older until the process required by § 106 of the National Historic Preservation Act is completed. SEE has prepared a written environmental assessment in this matter which may be obtained by contacting Harold Johnson [202-275-6874] of the Environmental Staff. We conclude that this action will not significantly affect either the quality of the human environment or energy conservation.

CHAIRMAN GRADISON, dissenting:

I have already made the argument, in my concurring statement in the Finance Docket No. 31256 decision, served July 5, 1988, that the second of the two transactions concerning which the CV has petitioned under 49 U.S.C. § 10505 (a proposed trackage rights agreement between CV and B&M to be imposed by the Commission) simply does not fall into the types of transactions for which an

exemption from the regulatory requirements of 49 U.S.C. §§ 11343-11345 is available. I will not repeat here the discussion I made there except to point out that ordering Amtrak and B&M to conduct negotiations for a twenty day period over what trackage rights, if any, B&M will be allowed to purchase in order to operate over its former property surely does not isolate and cure the intertwined nature of the subsequent Amtrak to CV transaction, which I believe runs afoul of the rule established in *Brae Corp. v. United States*, 740 F.2d 1023 (D.C. Cir. 1984), *cert. denied*, 105 S. Ct. 2149 (1985). It is clear that CV has the contractual right to stand in Amtrak's place in such dealings which, in any event, will not and could not have the slightest resemblance to the sort of actual market transactions which in certain cases are to be exempted from regulation.

There is, however, a more fundamental problem involved in this case. It can hardly be denied that the series of transactions proposed here constitute a great deal of overreaching on the part of Amtrak and CV. To label such conduct as merely "unattractive" corporate behavior would be surely to make a gross understatement. It would be one thing if Amtrak, assuming it wanted and needed the Conn River Line for intercity rail passenger service and having failed to come to an agreement with B&M for its acquisition, had merely invoked its limited rights of eminent domain granted to it by Congress and had instituted a proceeding under § 402(d) of the Rail Passenger Service Act ("RPSA"). Indeed, there is nothing in the present record that suggests that Amtrak is not entitled to an order from the Commission requiring a conveyance of whatever estate it needs in the subject property and fixing the reasonable terms and conditions therefor, including just compensation, as set out in the statute. I do not deny that Amtrak has met its burden of proof in this regard.

What I do object to is the attempt by Amtrak to restructure as between private, competing rail common carriers of freight that part of the ownership of the Conn River Line which it has admitted it does not need and does not want. The record is shockingly clear in this regard. It appears that CV has designs on the property of its competitor, B&M; Amtrak, although itself a private, nongovernmental entity, has been delegated certain limited eminent domain powers; Amtrak and CV strike a deal whereby Amtrak will not only take the estate it needs to operate intercity rail passenger service from B&M but, for good measure, will also seize the underlying fee and transfer it to CV; in exchange for this unique service CV has understandably agreed to underwrite the entire enterprise and has agreed in advance to an attractive 20-year tenancy in favor of Amtrak for that portion of the estate which is of actual use to Amtrak.

Since it is hard to imagine a more blatant misuse of the public's eminent domain power than for it to be employed for the personal enrichment of private interests, the salient question, artfully dodged and left unanswered by the majority, necessarily becomes: "Is this aforesaid outcome either mandated or permitted by the statute?" I conclude that it is not, and, further, that, in interpreting the statute to countenance the outcome sought by Amtrak and CV, the statute is being applied in an unconstitutional manner in violation of the Fifth Amendment's "public use" limitation on the exercise of the eminent domain power.

Amtrak has advanced, and the majority has acquiesced in, a different view, Amtrak argues that its secondary conveyance of the Conn River Line to CV involves the virtually identical question which the Second Circuit resolved in Amtrak's favor in *National R.R. Pass. Corp. v. Two Parcels of Land*, 822 F.2d 1261 (1987). There, Amtrak, under § 305(d) of the RPSA, successfully condemned a strip of nonrail property in New London, Connecticut, "required for intercity rail passenger service." The condemnation plan called for part of the property to be taken by Amtrak to be subsequently conveyed to the City of

New London for the construction of a public street or service road running parallel to the railroad right of way. While Amtrak reserved a permanent easement over this property for railroad inspection, maintenance, and repair, the city was to construct and maintain the new road. The court resolved the issue of whether or not the land required for the secondary conveyance could be condemned consistent with Amtrak's limited taking authority as follows:

> We see no impropriety in Amtrak's condemnation of property within the scheme of an overall cooperative agreement with New London and the FRA whereby the service road, the need for which is unchallenged, is maintained by New London. New London's grant of a permanent easement to Amtrak for inspection/maintenance purposes, the exercise of which may periodically close the road to the public, demonstrates the significant relationship between the condemned property and the provision of intercity rail passenger service. (*Id.* at p. 1265).

The question of whether a violation of the "public use" limitation of the taking clause did not arise in this case, and in fact the property owner, according to the court, did not dispute the right of Amtrak to condemn the property as a service road, only that it could not do so on behalf of the City of New London. (If New London had been required to condemn the property on its own behalf, the compensation issue would have been controlled by Connecticut law. Apparently this would have resulted in a larger award for the landowner.) In any event, it is well established in law that the condemnation of private property not in the public use in order to establish a public road does not violate the "public use" limitation. This longstanding rule was not at issue in this case.

Amtrak has asserted that the fact that the City of New London is a "public entity with eminent domain power"

and CV is a "public utility with similar power" and enjoys a "quasi-public status strengthens the conclusion that the taking of the Conn River Line and its transfer to CV thereafter, as proposed by Amtrak, would be in accord with the expressed purpose of § 402(d)." (Amtrak's "Application and Memorandum of Law," Vol. I, at 50-51.) Why this is so is not made clear, and, ultimately, Amtrak rests its entire argument concerning the validity of its secondary conveyance for the benefit of CV on the notion that the Supreme Court in *Berman v. Parker*, 348 U.S. 26 (1954) and *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984) has so vitiated the "public use" limitation that it is now no more than a generalized "public purpose" requirement. According to Amtrak, the scope of its eminent domain authority is as broad as its general public purpose: "Clearly, the condemnation power granted by Congress to Amtrak is predicated on a proper and reasonable public purpose: the promotion of continued rail passenger service in the United States." (Amtrak's *Application* at 52.)

Amtrak is so bold as to quote the Supreme Court holding in *Midkiff* as having application in this case: "[T]he Court has made clear that it will not substitute its judgment for a legislature's judgment as to what constitutes a public use 'unless the use be palpably without reasonable foundation.' " *Id.*, 467 U.S. at 241. But, as far as I can see, this analysis has absolutely nothing to do with the standards to be applied to determine and limit the extent of condemnation powers which have been delegated to Amtrak. As the Second Circuit squarely held in the New London case:

> Amtrak is not a "governmental body;" it is the creature of a statute which specifically provides that Amtrak shall not be an agency or establishment of the federal government. *Amtrak has not been authorized to exercise the sovereign's power of eminent domain.* It has been granted a limited power, within the meaning of *United States v. Carmack*, 329 U.S. 230, 67 S.

> Ct. 252, 91 L.Ed. 209 (1946), to condemn land "required [for] intercity rail passenger service." *Id.* 822 F.2d at 1264, 1265 (footnotes omitted, emphasis added).

As much as Amtrak might like to pass itself off as the equivalent of a state legislature or as the recipient of some generalized sort of plenary delegation of eminent domain power from Congress to go out and rearrange other people's property titles in accordance with what it calls its best "business judgment," the law has clearly and traditionally held otherwise in the cases of private corporations which for some special purpose have been delegated a limited condemnation power. Amtrak is not entitled to the deference which is accorded a state legislature or a government agency carrying out a statutory directive.

United States v. Carmack, 329 U.S. 230 (1947), cited above by the Second Circuit in its New London decision, states the distinction as follows:

> In the instant case, we deal with broad language employed to authorize [federal] officials to exercise the sovereign's power of eminent domain on behalf of the sovereign itself. This is a general authorization which carries with it the sovereign's full powers *except such as are excluded expressly or by necessary implication.* A distinction exists, however, in the case of statutes which grant to others, such as public utilities, a right to exercise the power of eminent domain on behalf of themselves. These are, in their very nature, grants of limited powers. They do not include sovereign powers greater than those expressed or necessarily implied, especially against others exercising equal or greater public powers. *In such cases the absence of an express grant of superiority over conflicting public uses reflects an absence of such superiority. Id.*, 329 U.S. at p. 243, n.13 (emphasis added).

It is instructive to note that *Carmack* involved the question of whether federal officials under a broad grant of authority to condemn land for the erection of post offices and other public buildings could condemn land held by a city in trust for such public purposes as a local park or city hall. The Supreme Court held that it could, but it was careful to include the above quoted caveat. This brings us back to the point that Amtrak has raised about the fact that CV is, itself, a "public utility" with a "quasi-public status." What Amtrak fails to emphasize is that this is also the case with B&M. It is well established in the law that the operation of a railroad, as a common carrier, is a "public use," and there also exists long settled law as to how the eminent domain power relates in these and similar public utility cases. And this is the law that ought to be applied in this case, because it is clear that B&M's property known as the Conn River Line presently is in the "public use."

I believe the principles established in *West Bridge Co. v. Dix*, 6 How. 507 (1848), still control how Amtrak's limited condemnation power is to be construed, absent an expressly stated delegation of authority in the statute to the contrary. That case involved the question of whether a statute of the State of Vermont was in conflict with the U.S. Constitution's proscription against the impairment of contracts by the States. In 1795 the Vermont legislature had given the bridge company a 100 year corporate franchise to have the exclusive right to build a bridge and charge tolls over a four mile stretch of the West River. The amount of the tolls to be charged was subject to state regulation in a manner similar to present day public utility regulation. In 1839 Vermont passed a new statute and proceeded to condemn the previously granted franchise under its power of eminent domain in order to abolish the tolls and convert the bridge into part of a free public highway. Just as he had when he represented the Charles River Bridge Company eleven years previously and Dart-

mouth College before that, Daniel Webster relied on the contract clause in his contention that Vermont could not condemn what it had created by contract, but central to his argument was that the property had already been put to the public use and the state had no right to condemn it once more for the same purpose:

> [E]very turnpike, railroad, or toll-bridge, though made by a corporation, still is a highway, and an erection for public use; and therefore a clause in such grant to take private property, making compensation therefor, without consent of the owner, for such highway, is a legitimate exercise of the power of eminent domain. When, therefore, this power has been exercised, or the delegation of its exercise has been granted to the corporation and been used, and the private property been taken and devoted to the public use, the power has exhausted itself on the subject. All that remains is the contract of the State with the corporation, that is, that the erection shall be sustained by the corporation for public use, and compensation received therefor by the receipt of certain tolls. Now, can the State impair and abolish this contract by again exercising the power of eminent domain on the subject? *Id.*, brief for the plaintiffs in error, at 519.

The Supreme Court's answer was a qualified "yes." This could be done if, and only if, the property was needed for a new and greater public use. Three justices offered their opinion on the matter and the conclusion was clear on this score. Justice McLean addressed one of Webster's arguments as follows:

> It is argued, that, if the State may take this bridge, it may transfer it to other individuals, under the same or a different charter. This the State cannot do. It would in effect be taking the property from A to convey it to B. The public purpose for which the power is exerted must be real, not pretended. *Id.*, at 537.

Justice Woodbury made the same point in this manner:

> [W]hen, as in the present case, a free public use in a highway or bridge is substituted for a toll-bridge, and on a long and great and increasing line of public travel, and thus vests *both a new benefit and use, and a more enlarged one, in the public*, and not in any few stockholders, I have no doubt that these entitle that public for such a use to condemn private property, whether owned by an individual or a corporation. *Id.*, at 547.

The case stands for the proposition that the property of a private corporation which has been dedicated for the public use cannot be taken and vested in another private corporation of the same kind and for the same public use. In *Petition of Philadelphia, M. & S. St. Ry. Co.*, 53 Atl. 191 (Sup. Ct. of Pennsylvania, 1902), the court applied the principle to invalidate the taking of the property of one railway in order to transfer it to another where the court could find no public use in the taking because the property was to be put to the same public use as before. Justice Dean explained the rule in *West River Bridge* thusly:

> [T]he court assumes, that the franchise could not have been taken from one corporation for profit under the right of eminent domain in the state, and vested in another private corporation of the same kind for profit. The public use is made to depend on the fact that thereafter [the use of the bridge] was to be free. It was therefore not a transfer of the franchise and property of one corporation for profit to another of like character, but a taking for a purely public use.
>
> • • •
>
> It in effect decides that the growing necessities of a progressive age must be met by the exercise of the state's power of eminent domain. The public road appropriates the bridle path; the turnpike road, the pub-

lic road; the electric railway, the turnpike road; the steam railroad; the canal bed. *Id.*, at 193-194.

The court then proceeded to strike down as violative of the "public use" limitation on the taking power a legislative act by which one railroad was granted the authority to take the property of another. The court held:

> [T]he authority of the legislature to confer on a corporation the right to take the franchise and property of an older corporation for public use cannot be questioned. Whether it be expedient or wise for the legislature to exercise this authority to take property for public use is purely a political question, and one solely for the legislature. *But whether the use to which it is sought to appropriate the property authorized to be taken is a public use is a judicial question, for the determination of the courts. Id.*, p. 93.

• • •

> The effect, the only effect, of this fourteenth section and the amendment is to transfer the property of one private corporation to a new one for the same public use, both being transporters of passengers for profit. The transaction is not, in substance, different from the transfer of one farmer's land to his neighbor under some assumed right of eminent domain, which has not a shadow of warrant in the constitution. *Id.*, at 194.

One does not have to take the view that a modern day court would have struck down the statute in question to apply the court's reasoning in that case and others to the instant case. In today's world it may well be that if Congress had purported to have given Amtrak the express authority to condemn the property of one railroad and to transfer that property to a competing railroad and had recited a public purpose for doing so, a court would feel inclined not to strike it down, even if it were commonly

understood by all involved that the actual purpose of the taking was simply to take the property of A and give it to B.

The present case is surely different: (1) Amtrak is not a part of the government and is entitled to no such deference; (2) grants of taking power to corporations like Amtrak are limited to the power expressed or necessarily implied; (3) railroads in general do not have the power to take the property of another railroad absent an explicit and express legislative grant to do so (i.e., CV could not condemn the property of B&M), and such a legislative act would have to itself be consistent with the "public use" limitation of the Fifth Amendment; (4) the property that would be transferred to CV would continue to serve precisely the same public use as it does today; (5) even if the transfer of the B&M property to CV could be said to serve some greater public use (e.g., better or more efficient freight service, as some intervenors have admitted is their real interest in this case), Amtrak has no authority under its taking power to take property for such purposes.

I respectfully dissent.

It is ordered:

1. Under § 402(d) of the Rail Passenger Service Act (RPSA), 45 U.S.C. § 562(d), we find that Amtrak has sustained its burden of proof and established a need for the conveyance requested in its application, as revised. Amtrak has until August 1988, to notify the Commission in writing whether it will purchase the described railroad line and related interests from B&M or withdraw its application.

2. Just compensation for B&M's interests in the Connecticut River Line subject to Amtrak's taking under its § 402(d) application is established at $2,373,286. Upon Amtrak's tendering to B&M of this amount, B&M is directed to convey to Amtrak its interests in the line as described below:

(a) all rights, titles and interest in the rail right-of-way and structures, except as described in paragraph 3 of this Order, between a point where the CV-owned trackage at the north end of the Connecticut River Bridge in Windsor, Vermont terminates (approximately B&M MP 108.3) and a point where CV-owned trackage at Bridge Street in Brattleboro, Vermont (approximately B&M MP 60.1) commences;

(b) all rights, titles and interest in a spur track (known as the Brattleboro or West River spur) and right-of-way extending from the CV right-of-way to a line ten feet east of the center line of the spur and approximately 1,300 feet south of Bridge Street in Brattleboro to the crossover to the CV-owned trackage;

(c) the right to dispatch operations over the trackage between White River Junction, Vermont and East Northfield, Massachusetts secured to B&M by virtue of the trackage rights agreement between CV and B&M dated January 1, 1930 ("1930 Agreement") and other informal operating arrangements between CV and B&M;

(d) all rights, including those under the 1930 Agreement, to maintain and operate the segment of CV trackage between the point north of the Connecticut River Bridge where B&M-owned trackage terminates (approximately B&M MP 108.3) and a point adjacent to the passenger depot at Windsor, Vermont (approximately B&M MP 108.9) where CV-owned and maintained trackage commences; and

(e) all rights, titles and interests in the signalling system (including poles, wires and circuitry) between White River Junction and East Northfield, including approaches (track signalling circuitry) at White River Junction and East Northfield.

3. This Order does not authorize Amtrak to receive title to, and possession and control of the following interests

in, and rights pertaining to that line of railroad in Vermont and New Hampshire known as the Connecticut River Line:

(a) B&M's interests in existing fiber optics leases, and the right to develop, arrange for installation under and receive revenues from, future fiber optics leases, all of which are expressly reserved to B&M; provided, however, that nothing in this Order shall be construed to permit B&M unreasonably to interfere with the operation of freight and passenger trains on this Line; and provided further that B&M or its employees, agents or contractors, during the installation of materials to implement fiber optics leases shall comply with rules and regulations of CV governing work on or near its right-of-way.

(b) All of B&M's right, title and interest as tenant in common or otherwise, in the railroad passenger station at Bellows Falls, VT.

(c) Those parcels of property described in Appendix B to the Verified Statement of Dennis Sullivan, filed in this proceeding on July 13, 1988, as being outside the right-of-way.

4. In Finance Docket No. 31250, we impose as terms and conditions of Amtrak's taking, pursuant to § 402(d) of RPSA, that trackage rights to allow it to continue to serve its existing shippers exclusively be granted to B&M and that the $75,000 offer is a payment ceiling. Parties have 20 days in which to negotiate terms and conditions for the trackage rights. If the parties are unable to agree on terms at the end of the period allowed for negotiation, any party may request the Commission to set the terms and conditions for the trackage rights provided that B&M is under no obligation to operate under trackage rights.

5. In Finance Docket No. 31259, under 49 U.S.C. § 10505, we exempt from the requirements of 49 U.S.C. § 11343, *et seq.*, the acquisition and operation by CV of the above-described railroad line and related interests of

Amtrak acquired by this § 402(d) proceeding, subject to the employee protective conditions in *New York Dock Ry.—Control—Brooklyn Eastern Distr.*, 360 I.C.C. 60 (1979), as modified herein, and for employees affected by the grant of trackage rights to the B&M, the protective conditions in *Norfolk & Western Ry. Co.—Trackage Rights—BN*, 354 I.C.C. 605 (1978), as modified in *Mendocino Coast Ry. Inc.—Lease and Operate—California Western Railroad*, 360 I.C.C. 653 (1980).

We further require that CV be responsible for all labor protection expenses arising from both the transactions approved here.

6. Notice will be published in the *Federal Register* in Finance Docket No. 31259 on August 11, 1988.

7. Petitions for reconsideration in Finance Docket No. 31259 must be filed by August 31, 1988.

8. Applicants will be required to supply the appropriate State Historic Preservation Officer with the information specified in 49 C.F.R. § 1105.7(c)(10) for all properties 50 years old or older (other than the Bellows Falls depot) that are discovered once the transactions are consummated and to preserve intact all sites and structures 50 years old or older until the process required by §106 of the National Historic Preservation Act is completed.

9. B&M, ST, their parent company Guilford Transportation Industries, Inc., and any and all other persons in possession or control of the rights and interests described in paragraph 2 of this Order shall not interfere with or hinder Amtrak's or CV's possession or control thereof, and shall cooperate fully with Amtrak's or CV's possession and control thereof, including the dispatching of trains on the subject property by Amtrak or CV or their designee, and the entry of work crews thereon under the direction of Amtrak or CV or their designee.

10. This decision is effective on August 12, 1988.

By the Commission, Chairman Gradison, Vice Chairman Andre, Commissioners Sterrett, Simmons, and Lamboley. Chairman Gradison dissented with a separate expression.

Vice Chairman Andre was absent and did not participate.

INTERSTATE COMMERCE COMMISSION

DECISION

NATIONAL RAILROAD PASSENGER CORPORATION - CONVEYANCE OF BOSTON AND MAINE CORPORATION INTERESTS IN CONNECTICUT RIVER LINE IN VERMONT AND NEW HAMPSHIRE

Finance Docket No. 31250

Decided: July 1, 1988

On April 26, 1988, we set out a procedural schedule which provided that on or about this date we would issue our determination of the need question.[1] Based on the evidentiary record developed on this issue, it is our decision that Amtrak has sustained its burden of proof and established a need for the conveyance requested.

Accordingly, we anticipate requiring conveyance as a part of our final decision in this matter. However, in the interim until final decision, the interests of the Boston & Maine are not altered, and therefore, its use and operations on the line are not here affected.

Further, in the absence of mutual agreement between the parties, we are prepared to determine and set the terms and conditions of compensation.

Therefore, we request that the parties proceed to submit their respective positions and arguments with respect to compensation in accordance with the set procedural schedule, in anticipation of our decision on or about August 8, 1988.

---

[1] Section 402(d) of the Rail Passenger Service Act, 45 U.S.C. 562(d).

This action will not significantly affect the quality of the human environment or energy conservation.

It is ordered:

1. This decision is effective on the date served.

By the Commission, Chairman Gradison, Vice Chairman Andre, Commissioners Simmons, Sterrett, and Lamboley. Vice Chairman Andre dissented with a separate expression. Chairman Gradison dissented and will submit a separate expression at a later date.

(SEAL)

Noreta R. McGee
Secretary

VICE CHAIRMAN ANDRE, dissenting in part:

I would have found that AMTRAK may acquire only whatever minimum lesser interest in the property which is necessary for AMTRAK to accomplish its goal of service restoration. In other words, B&M should not be directed to convey its full property interest in the line. This approach has several advantages over the majority's insistence on a full transfer under section 402(d):

(1) First, the competitive issues raised by CP would be avoided since B&M would remain the only provider of freight service.

(2) Secondly, Finance Docket No. 31259 could be dismissed because there would be no need for a second transfer of the property and a conveyance of trackage rights back to B&M.

(3) Finally, B&M's just compensation award would be reduced due to the reduced property interest transferred to AMTRAK.

AMTRAK designed these transactions to avoid the problems inherent in full ownership of the line. AMTRAK is

no doubt less than eager to have to compensate B&M, or any other carrier, for acquiring full title to the line. Moreover, AMTRAK is neither able nor willing to provide freight service for the shippers on the line.

In order to avoid these problems, AMTRAK opted to acquire the entire property interest, sell it to CV, and arrange for trackage rights for existing freight service to be given back to B&M. This series of transactions is needlessly complex and is not required for AMTRAK to accomplish its goal of sufficient control over the property to effect service restoration. A partial transfer under section 402(d) would avoid competitive problems and still enable AMTRAK to avoid the problems that led it to propose these transactions.

AMTRAK has asserted that another reason for its proposed series of transactions is that it is reluctant to deal further with B&M's parent Guilford. However, as long as B&M continues to provide freight service on the line, AMTRAK will have to deal with Guilford directly or indirectly, regardless of whether formal title to the line is held by B&M or CV.

I also continue to believe that B&M is not being allowed sufficient opportunity to make its case on the valuation issue. See my separate expression to the decision served May 11, 1988.

INTERSTATE COMMERCE COMMISSION

DECISION

NATIONAL RAILROAD PASSENGER CORPORATION - CONVEYANCE OF BOSTON AND MAINE CORPORATION INTERESTS IN CONNECTICUT RIVER LINE IN VERMONT AND NEW HAMPSHIRE

Finance Docket No. 31250

CENTRAL VERMONT RAILWAY, INC. - PETITION FOR EXEMPTION - ACQUISITION AND OPERATION OF CERTAIN INTERESTS IN RAIL LINES FROM THE NATIONAL RAILROAD PASSENGER CORPORATION

Finance Docket No. 31259

Decided: May 19, 1988

By decision served April 29, 1988, we: (1) instituted this proceeding pursuant to an application filed by the National Railroad Passenger Corporation (Amtrak) under section 402(d) of the Rail Passenger Service Act (RPSA), 45 U.S.C. 562(d); (2) consolidated it with a related petition for exemption filed by Central Vermont Railway, Inc. (CV) in Finance Docket No. 31259; (3) set forth a procedural schedule for the resolution of these matters; and (4) disposed of a number of pending procedural requests and petitions to intervene. By decision served May 11, 1988, we denied objections to the procedural schedule filed by the Boston and Maine Corporation (B&M), clarified the procedural schedule to provide that labor protection will be considered

as part of our determination of "just compensation" for the line, and granted additional petitions to intervene.

As discussed in our April 29th decision, Amtrak specifically requested in its application that the Commission order, pursuant to section 402(d), that a 48.8-mile segment of the line of railroad called the Connecticut River Line (located in the States of New Hampshire and Vermont), and certain other property and contract interests belonging to B&M, be conveyed to it and that the Commission establish the terms for the sale of the line. Amtrak has stated that conveyance of the 48.8-mile segment is necessary for it to resume its Montrealer passenger train service between Washington, DC and Montreal, Canada, previously provided over that segment of track. As part of its plan to restore this service, Amtrak states that it entered into a series of agreements with the CV for the future ownership and control of the line, for the prompt and efficient upgrading of the line, and for the operation of the Montrealer passenger service for a 20-year period. These agreements also provide that B&M will acquire trackage rights over the line upon CV's acquisition of the line from Amtrak. In the related Finance Docket No. 31259, to obtain Commission authority to implement these agreements, CV filed a petition for exemption: (1) to acquire Amtrak's interests in the line once Amtrak has obtained these interests; and (2) to grant trackage rights over the line to B&M.

On April 22, 1988, B&M filed a verified petition to convert Amtrak's application filed under section 402(d) to an application under section 402(a) of the RPSA.[1] In its

[1] Under section 402(a) of the RPSA, Amtrak may contract with railroads for the use of tracks and other facilities and the provision of services on such terms and conditions as the parties may agree. In the event of a failure to agree, the Commission is empowered to order the provision of services or the use of tracks or facilities of the railroad by Amtrak, upon application by Amtrak, if we find that doing so is

petition, B&M requests that the Commission consider the Amtrak application as if the application were filed under the provisions of section 402(a) instead of section 402(d). B&M claims that it shares Amtrak's desire to have the Montrealer passenger service resumed over its line and that since it is willing to enter into an operating agreement with Amtrak on reasonable terms and conditions, it is unnecessary for the Commission to compel B&M to convey the line which, under Amtrak's plan, would ultimately be conveyed to CV, a principal competitor. B&M contends that it has attempted in good faith to reach an agreement with Amtrak and that the primary obstacle to an agreement has been divergent views with respect to the appropriate method of sharing the cost to maintain the line at the standards which Amtrak desires. B&M states that it is willing to enter into an operating agreement with Amtrak providing for Amtrak to pay the additional cost to maintain the line at speeds set by Amtrak for passenger service. If the parties are unable to agree on the amount of such costs, B&M states it is willing to have the Commission make this determination, as contemplated by section 402(a). B&M concludes that treating the application undersection 402(a) offers the most straightforward and fastest method of achieving Amtrak's goal of reinstituting operation of the Montrealer. On May 5, 1988, Amtrak replied opposing B&M's request.

We will deny B&M's request that the proceeding be converted from one under section 402(d) to section 402(a). Under sections 402(a)-(d) of RPSA, respectively, Amtrak is empowered to seek different types of relief depending on the type of service problems it encounters with other

necessary to carry out the purposes of the RPSA. The Commission may also fix just and reasonable terms of compensation. Thus, section 402(a) merely empowers the Commission to order the provision of services or the use of the tracks of a railroad by Amtrak whereas section 402(d) empowers the Commission to order the actual conveyance of the line.

railroads. In each case, relief may be granted only upon application by Amtrak, and in each case different criteria, procedures, and standards apply. *See* 45 U.S.C. 562(a)-(d). Here, Amtrak has made an election of remedies by filing its application under section 402(d) for conveyance of the subject line, and has done so deliberately. Amtrak's position clearly is that only when the subject line belongs to a party other than B&M will the line be available for prompt upgrading, permitting restoration of reliable and economical passenger service. Amtrak has not requested the Commission to consider alternative remedies in this case. As discussed in our April 29th decision, Amtrak has met the statutory criteria for the institution of a proceeding under section 402(d). Thus, Amtrak is plainly entitled under the statute to a decision on the requested conveyance of the line.

The State of New Hampshire has filed a petition to intervene in Finance Docket No. 31250. The State points out that, through its Department of Transportation, it administers a statutorily-mandated program to preserve, rebuild, modernize, maintain and operate railroads located within its geographic boundaries. According to New Hampshire, approximately one-half of the portion of the Connecticut River Line sought to be acquired by Amtrak is located within the State. Additionally, the Claremont and Concord Railway, a New Hampshire railroad, intersects with the subject line at Claremont Junction, NH, and the present owner of the line, B&M, provides freight service to businesses located in the State. New Hampshire concludes that its interests and those of its citizens will be directly affected by the Commission's disposition of Amtrak's application and, therefore, seeks leave to intervene.

New Hampshire has shown a sufficient interest in this proceeding and will be allowed to intervene. We are aware, however, that the time period for filing discovery requests has expired. To ensure a fair proceeding and complete record, we will allow the parties to serve discovery re-

quests on New Hampshire. These must be served within 3 days from the decided date of this decision. New Hampshire must respond to discovery requests on the issue of "need" for conveyance of the line within 5 days after the date it is served with a request on that issue. New Hampshire will adhere to the regular procedural schedule for responding to discovery requests on the issue of "just compensation" for the line. As New Hampshire has not sought to conduct discovery, we will not make a special provision for it to do so.

The Commonwealth of Massachusetts and the State of Vermont have each sought to intervene in Finance Docket No. 31259 in addition to Finance Docket No. 31250. Both have already been granted intervention in this proceeding by our April 29th decision, which consolidated Finance Docket Nos. 31250 and 31259. These additional petitions to intervene are, therefore, unnecessary and will be dismissed.

This action will not significantly affect the quality of the human environment or energy conservation.

It is ordered:

1. B&M's petition to convert Amtrak's application under section 402(d) to an application under section 402(a) is denied.

2. The petitions to intervene in Finance Docket No. 31259 filed by the Commonwealth of Massachusetts and the State of Vermont are dismissed.

3. The petition to intervene by the State of New Hampshire is granted. Parties may serve New Hampshire with discovery requests. Such requests must be served within 3 days from the decided date of this decision, and New Hampshire must respond to discovery requests on the issue of "need" for conveyance of the line within 5 days after the date it is served with a request on that issue.

4. This decision is effective on the date of service.

By the Commission, Chairman Gradison, Vice Chairman Andre, Commissioners Sterrett, Simmons, and Lamboley.

Noreta R. McGee
Secretary

(SEAL)

INTERSTATE COMMERCE COMMISSION

DECISION

NATIONAL RAILROAD PASSENGER CORPORATION - CONVEYANCE OF BOSTON AND MAINE CORPORATION INTERESTS IN CONNECTICUT RIVER LINE IN VERMONT AND NEW HAMPSHIRE

Finance Docket No. 31250

Decided: April 26, 1988

On April 4, 1988, the National Railroad Passenger Corporation (Amtrak) petitioned the Commission to institute a proceeding under section 402(d) of the Rail Passenger Service Act (RPSA), 45 U.S.C. 562(d).[1] By its petition,

---

[1] Section 402(d) provides, in relevant part, as follows:

> (d) Disagreement procedures
>
> (1) If the Corporation and railroad are unable to agree upon terms for the sale to the Corporation of property (including interests in property) owned by the railroad and required for intercity rail passenger service, the Corporation may apply to the Commission for an order establishing the need of the Corporation for the property at issue and requiring the conveyance thereof from the railroad to the Corporation on reasonable terms and conditions, including just compensation. Unless the Commission finds that—
>
> (A) conveyance of the property to the Corporation would significantly impair the ability of the railroad to carry out its obligations as a common carrier; and (B) the obligations of the Corporation to provide modern, efficient, and economical rail passenger service can adequately be met by the acquisition of alternative property (including interests in property) which is available for sale on reasonable terms to the Corporation, or available to the

Amtrak requests that the Commission order that a line of railroad and certain other property and contract interests belonging to Boston and Maine Corporation (B&M), a subsidiary of Guilford Transportation Industries, Inc. (Guilford), be conveyed to it and that the Commission establish the terms for the sale of the line. On April 7, 1988, Central Vermont Railway, Inc. (CV) filed a petition for exemption in Finance Docket No. 31259; (1) to acquire Amtrak's interests in the line once Amtrak has obtained these interests; and (2) to grant trackage rights over the line to B&M. Amtrak has filed a petition for document discovery. The Commonwealth of Massachusetts (Massachusetts) and the State of Vermont have each sought to intervene and have requested modifications to the procedural schedule proposed by Amtrak for processing its application. On behalf of the State of Connecticut, the Connecticut Department of Transportation (CDT) has sought intervention. Also, the Canadian Pacific, Ltd. (CP) has filed a petition to intervene and a motion to broaden the scope of the proceeding. B&M has asked us to reject the application and Amtrak has replied.

We will: (1) deny B&M's request to reject; (2) grant CP's, CDT's, Massachusetts', and Vermont's petitions to intervene and Amtrak's petition for document discovery; and (3) institute the requested proceeding. We will also require Amtrak to file with the Commission and serve on the parties certain additional information within 5 days of the service date of this decision. Finally, we will consolidate CV's petition for exemption with Amtrak's request for the section 402(d) proceeding.

Corporation by the exercise of its authority under section 545(d) of this title,

the need of the Corporation of the property shall be deemed to be established and the Commission shall order the conveyance of the property to the Corporation on such reasonable terms and conditions as it may prescribe, including just compensation.

The subject line consists of a 48.8-mile segment of the line of railroad called the Connecticut or Conn River Line. The segment runs along the Connecticut River, starting at Brattleboro, VT (approximately milepost 60.1), crossing the river at Bellow Falls, VT (approximately milepost 83.8) into New Hampshire and crossing back to Vermont near Windsor, VT (approximately milepost 108.3), where this segment ends. Specifically, Amtrak seeks the following property or contract interests in the Conn River Line:

(a) all rights, titles and interests (with the exception of interests in existing fibre optics leases) in the rail right of way and structures between a point where the CV owned trackage at the north end of the Connecticut River Bridge in Windsor, Vermont terminates (approximately B&M milepost 108.3) and a point where CV-owned trackage at Bridge Street in Brattleboro, Vermont (approximately B&M milepost 60.1) commmences;

(b) All rights, titles and interests in a spur track (known as the Brattleboro or West River spur) and right of way extending from the CV right of way to a line ten feet east of the center line of the spur and approximately 1,300 feet south of Bridge Street in Brattleboro to the crossover to the CV-owned trackage;

(c) the right to dispatch operations over the trackage between White River Junction, Vermont and East Northfield, Massachusetts secured to B&M by virtue of the trackage rights agreement between CV and B&M dated January 1, 1930 (1930 Agreement) and other informal operating arrangements between CV and B&M;

(d) All rights, including those under the 1930 Agreement to maintain and operate the seg-

ment of CV trackage between the point north of the Connecticut River Bridge where B&M-owned trackage terminates (approximately B&M milepost 108.3) and a point adjacent to the passenger depot at Windsor, Vermont (approximately B&M milepost 108.9) where CV owned and maintained trackage commences; and

(e) all rights, titles and interests in the signalling system (including poles, wires and circuitry) between White River Junction and East Northfield, including approaches (track signalling circuitry) at White River Junction and East Northfield.

Amtrak previously provided its Montrealer passenger train service between Washington, DC and Montreal, Canada over this segment of track. Amtrak states that it was compelled to discontinue this service in April 1987 due to the deterioration of B&M track segments along the route, including the segment Amtrak is seeking to acquire here. Amtrak states that it cannot reach an agreement with B&M for the resumption of this service and that B&M is considering discontinuance of rail service altogether on the line.[2] Thus, Amtrak has requested that the Commission institute a proceeding under section 402(d) for the forced conveyance of this line to it so that passenger service may be resumed over the line.

Amtrak states that on March 18, 1988, it entered into a series of Agreements with the CV for the future ownership and control of the line, for the prompt and efficient upgrading of the line, and for the operation of the Mon-

---

[2] Pursuant to 49 CFR 1152.10, B&M designated this segment as a Category One line in September 1987. However, on March 25, 1988, B&M filed a revised System Diagram Map that deletes the Conn River Line from Category One and lists it in Category Five.

trealer passenger service for a 20-year period. These agreements also provide that B&M will acquire trackage rights over the line upon CV's acquisition of the line from Amtrak.[3] A copy of the proposed trackage rights agreement between CV and B&M has been included with Amtrak's application, but the other agreements have not.[4] Although Amtrak has indicated that it would release the agreements with CV during discovery, we believe the immediate filing of these agreements is necessary to assure that we have complete information before us in order that we, and all interested parties, have the opportunity to understand fully the involved transaction Amtrak is proposing here. Therefore, we will require Amtrak to file with us and serve on the parties to this proceeding copies of these agreements with CV and copies of its 1977 operating agreement with B&M under which it previously provided the Montrealer passenger service within 5 days.[5]

---

[3] On page 3 of its application, Amtrak states that it "will retain operating rights on the line for the Montrealer and for B&M." Subsequently, at page 13 of its application, Amtrak clarifies the transaction by stating that, upon its acquisition of the property interests form B&M, "Amtrak will convey them to CV, which has agreed to grant B&M trackage rights permitting B&M to continue without interruption its present operations." The proposed trackage rights agreement shows the grant being from CV to B&M.

[4] The proposed trackage rights agreement provides that B&M will retain the sole right to serve shippers' facilities existing on the line as of the date of the conveyance as long as B&M maintains service of certain minimum levels. The right to serve new shippers or facilities that come on the line after that date will be reserved for CV. B&M will also be granted the right, along with CV, to interchange at Bellows Falls with the Green Mountain Railroad Corporation and the sole right to interchange with the Claremont and Concord Railway at Claremont Junction, NH. CV will acquire B&M's right to dispatch, maintain, and operate signals over the subject segment and over adjoining segments currently owned by CV.

[5] This information may be made the subject of a protective order agreed to by the parties, or at their request, imposed by the Commission, and filed under seal.

Additionally, Amtrak must file an environmental report and notify the appropriate State agency in VT and NH of the opportunity to submit information concerning the energy and environmental impact of the proposed action in accordance with 49 CFR 1105.11. Alternatively, Amtrak may explain why the provisions of the National Environmental Policy Act of 1969 and the provisions of the National Historic Preservation Act of 1966 are inapplicable here.

Amtrak states that this matter must be resolved expeditiously or it will not be able to resume the Montrealer passenger service this Fall as planned, but will have to wait until Spring of next year. In its Notice of Intention, filed March 23, 1988, Amtrak explains that prompt remedial action is imperative and requests expeditious action by the Commission.[6] Its concerns are that: (1) accelerating deterioration on the line is continuing; (2) limited funds appropriated by Congress for the reinstitution of the Montrealer may lapse or be redirected elsewhere; and (3) failure to complete the estimated 3-5 months of repairs before the ground freezes in the late Fall will delay the Montrealer service for another year. Moreover, under section 402(d)(2), Amtrak points out that the Commission is required to expedite such proceedings and issue its order within 120 days from the filing date of the application.[7] In view of this requirement and the reasons given by Amtrak, we will adopt a procedural schedule similar to the one proposed by Amtrak,[8] but somewhat more expedited to ensure that decisions on all aspects of these consolidated proceedings can be arrived at by the Commission within the 120 day time frame set forth in Section 402(d). It is set forth in the Appendix to this decision, and any requests for extensions of time will not be looked upon favorably.

[6] Windsor Minerals, Inc. filed a petition on April 1, 1988, in support of Amtrak's request for expedited procedure.

[7] Section 402(d)(2) of the Rail Passenger Service Act, 45 U.S.C. 562(d) states:

(2) The Commission shall expedite proceedings under this subsection and, in any event, issue its order within one hundred and twenty days from receipt of the application from the Corporation. If just compensation has not been determined on the date of the order, the order shall require, as part of just compensation, interest at the rate of 6 per centum per annum from the date prescribed for conveyance until just compensation is paid.

As requested by Amtrak, we propose to adopt a two track schedule. This will allow the Commission to issue separate decisions, (1) on the issue of whether an order establishing need for the conveyance of the line and requiring the conveyance is appropriate, and, if so, (2) on the issue of just compensation for the line. Additionally, we will consolidate with this proceeding CV's petition for exemption for its acquisition of the line from Amtrak and for its conveyance of trackage rights to B&M. CV's proposals are an essential part of the overall transaction here and, therefore, should be considered along with our determination of the issue of the need for the conveyance of the line to Amtrak. Moreover, this will facilitate our handling these matters on an expedited basis as requested by Amtrak and others and as mandated by law.

In its application, Amtrak states that the proper standard for compensation here is the going concern value of the line. It calculates this amount to be $506,000. Should the Commission decide that the value of the line exceeds this amount, Amtrak states that it must reserve the right not to follow through with the conveyance since its funds

[8] As discussed, *infra*, changes necessary to accommodate the participation of Massachusetts in this proceeding (and other interested parties beside Amtrak and B&M) have been made. Also, the schedule will provide that Government entities or other parties supporting Amtrak on the issue of its need for the line must file their evidence, arguments, or comments within 17 days after the service date of this decision. This will afford B&M an adequate opportunity to respond to those pleadings.

are limited. If the Commission orders conveyance prior to the final determination of just compensation, Amtrak further requests that the order provide that Amtrak may require conveyance by B&M upon a tender of Amtrak's estimated just compensation.

There are currently no Commission regulations to guide the parties in the submission of their evidence. The parties therefore should present all relevant information and supporting documents. The parties must fully explain whatever methodologies they use in determining just compensation for the line and any other terms and conditions of sale. In this regard, we will require Amtrak and parties in support of Amtrak to file supplemental evidence and argument on the issue of just compensation based on any information obtained through discovery prior to B&M's response on that issue. B&M will therefore be afforded the opportunity to respond to Amtrak's complete presentation on that issue. *See* Appendix.

In connection with its request for expedited handling of its application, Amtrak has filed a petition seeking waiver of 49 CFR 1114.30 requiring parties to obtain prior Commission approval to conduct document discovery. As part of this relief, Amtrak also seeks a Commission order directing the parties to respond promptly and fully to document production or inspection requests made by other parties to the proceeding. Amtrak argues that such action is necessary to avoid unnecessary delay by parties in producing documents critical to Amtrak's valuation of the Conn River Line and otherwise to the timely resolution of this proceeding. Amtrak states that the documents should be made available in Washington D.C. or at any other place deemed appropriate by the Commission pursuant to 49 CFR 1114.30(b). Amtrak concludes that parties would reserve the right under this procedure to request a protective order from any document request. B&M has opposed Amtrak's request on the grounds: (1) that Amtrak failed to verify its request as required by 49 CFR

1114.21(b)(2); (2) that it would be premature to grant the discovery at this time since Amtrak's application has not yet been accepted; and (3) that this discovery request would be inconsistent with Amtrak's request for discovery in its proposed procedural schedule included with its application.

We will grant Amtrak's discovery petition. Pursuant to 49 CFR 1114.21(b)(2), we may authorize parties to conduct document discovery under 49 CFR 1114.30 on our own motion and do so here. Thus, the failure of Amtrak to verify its petition is of no consequence. This action will facilitate the expeditious resolution of this proceeding as required by statute while still giving the parties the opportunity to conduct meaningful discovery within the time frames of the procedural schedule we are imposing here. In this fashion, Amtrak's discovery request will be consistent with both the procedural schedule it has proposed and the one we are adopting in this decision. The parties may determine among themselves where requested documents should be made available. We urge the parties to cooperate fully with each other in the timely resolution of all discovery requests, as dilatory tactics will not be tolerated.

On April 1, 1988, the Commonwealth of Massachusetts filed a petition for leave to intervene in this proceeding and submitted comments on Amtrak's proposed procedural schedule. It states that this proceeding will have unavoidable repercussions for Massachusetts since Amtrak will acquire certain B&M rights to dispatch trains operating in the Commonwealth and B&M rights to operate and maintain certain signals there. Also, Massachusetts points out that Amtrak's arrangements with CV may result in at least temporary rerouting of the Montrealer from its previous route through the Commonwealth, once service is resumed. Finally, Massachusetts points out that the resolution of the issues in this proceeding may affect the resolution of similar or identical issues in a future section 402(d) proceeding, that may be instituted with respect to

the Springfield-East Northfield, MA right-of-way, over which segment the Montrealer was also previously operated. Massachusetts has demonstrated a sufficient interest in this proceeding to warrant its intervention, and its petition to intervene will therefore be granted.[9]

On April 14, 1988, the State of Vermont (Vermont) also filed a petition for leave to intervene in this proceeding and submitted comments in support of Amtrak's proposed procedural schedule. It states that the Montrealer has carried thousands of passengers to and from Vermont prior to the deterioration of the Conn River Line. Approximately half of the mileage of the subject line lies in the State of Vermont, and according to Vermont, its shippers and other railroads operating there rely on the line for fast, efficient service. Vermont points out that B&M's failure to maintain

---

[9] Massachusetts has also submitted comments on Amtrak's proposed procedural schedule and other procedural aspects related to the proposed proceeding. As discussed in footnote 8, we have revised Amtrak's proposed schedule to allow participation by Massachusetts and other interested parties in the requested proceeding. We have also amended the filing date for the parties supporting Amtrak on the issue of need so that B&M will be afforded an adequate opportunity to respond. *See* Appendix.

Massachusetts has recommended in its comments that B&M be required to declare whether it will challenge Amtrak's need for the line Amtrak is seeking to acquire under section 402(d) or whether B&M will merely contest the amount of compensation Amtrak proposes to pay for the line. In view of B&M's statement in opposition to the application, discussed *infra*, filed April 6, 1988, imposing such a requirement has now become moot.

We also reject as unnecessary Massachusetts' recommendation that we require the parties to use messenger, telecopy, or overnight courier service for all filings on all active parties. However, we admonish the parties to cooperate fully with each other with respect to the expeditious service of pleadings due to the short deadline that will apply here.

Finally, we will deny Massachusetts' request that an Administrative Law Judge be assigned to this proceeding. If at a later date an ALJ is needed, one will be assigned.

its segment of the Conn River Line has resulted in severe harm to Vermont rail passengers and freight shippers and that the success of many other railroads operating within the state is tied to the outcome of this proceeding. In particular, CV depends upon the Conn River Line as a necessary link in its north-south service, and both the Green Mountain Railroad and the Lamoille Valley Railroad depend directly on connections with the Conn River Line for access to shippers and receivers inside and outside of the state. Vermont has also demonstrated a sufficient interest in this proceeding to warrant its intervention, and its petition to intervene will therefore be granted.[10]

By pleading filed April 15, 1988, CDT has sought to intervene in this proceeding. CDT states that it is responsible for public transportation within the State of Connecticut and to other states in the area. As such, it is anxious to see the Montrealer passenger service restored and is also concerned with CV's movement of freight between New London, CT and northern New England and Canada. CDT has demonstrated sufficient interest in this proceeding and will be allowed to intervene.

On April 20, 1988, CP filed a petition to intervene in this proceeding and a motion to broaden the scope of the proceeding. CP points out that CV is a wholly-owned subsidiary of Canadian National Railways (CN). CP states that it has long conducted freight operations over the Conn River Line and actively competes with CV/CN in the international movement of rail freight over that line. CP states that it would be significantly affected by any change in ownership or operation of that line segment.

---

[10] In its comments in support of the proposed procedural schedule, Vermont agrees with Massachusetts that B&M should be afforded the opportunity to respond to Government entities and other parties supporting Amtrak on the issue of need for the conveyance of the line. As discussed in footnote 8, we have incorporated this change into our procedural schedule.

We will grant CP's petition to intervene since CP has shown a sufficient interest. However, we need not grant CP's motion to "broaden the scope of this proceeding." As discussed *infra*, the parties may raise any relevant issue in this consolidated proceeding, and we will address those issues in our resolution of this case on the merits.

On April 6, 1988, B&M filed a statement in opposition to our acceptance of Amtrak's application. B&M argues that Amtrak's offer to purchase is a transparent attempt to meet the statutory criteria of section 402(d). B&M states that there has been no discussions with Amtrak for a sale other than a take-it-or-leave-it letter dated March 18, 1988, sent by Amtrak to B&M. According to B&M, Amtrak, therefore, has not met the statutory precondition for filing an application under section 402(d) that requires that the parties be "unable to agree upon terms of the sale." B&M concludes that it is simply premature at this time to know whether the parties will agree or will be unable to agree on the sale, so Amtrak's application should be rejected. We disagree. Amtrak has set forth a detailed history of its dealings and negotiations with B&M over the Conn River Line, and of its efforts to maintain passenger service over this line.[11] Amtrak made a valid offer to purchase[12]

---

[11] For example, after discontinuing the Montrealer service, Amtrak states that it has attempted on several occasions to negotiate restoration of the line and has offered to purchase B&M's interest in the Conn River Line to no avail. In April 1987, Amtrak even invoked arbitration before the National Arbitration Panel to resolve the dispute. Amtrak obtained an order compelling arbitration in the U.S. District for the District of Columbia. B&M has appealed the order. Even if it prevails, Amtrak states that that proceeding offers no prospect for achieving reinstitution of the Montrealer passenger service. Moreover, Guilford and B&M terminated discussions with Amtrak on negotiating terms to upgrade the line and restore service even after Congress had appropriated $5 million for the restoration of the Montrealer passenger service. *See Supplemental Appropriations Act*, 1987, Pub.L.No. 100-71, 101 Stat. 391 447-48. The appropriation in and of itself demonstrates

and, in response, B&M stated by letter dated March 29, 1988 that there was "no need to pursue the very complex offer to purchase" and instead proposed negotiations for compensation to B&M to rehabilitate and maintain its line for Amtrak's passenger service. Nothing in this record provides any indication that Amtrak and B&M will ever reach agreement on terms of a sale. Amtrak has sufficiently demonstrated that the parties have not been able to agree on the sale of the line to warrant the institution of a proceeding under section 402(d).

B&M also claims that CV, a direct competitor to B&M, is using Amtrak to acquire the Conn River Line because, in a past acquisition attempt, CV was unwilling to pay a fair price to purchase the line directly from B&M. B&M argues that the substance of the proposed transaction is the sale by B&M of a line of railroad to CV, which is a transaction the Commission must review under the terms of 49 U.S.C. 11343 and 11344. This issue is interrelated to the overall determination of whether Amtrak has demonstrated a "need", as required under section 402(d), to acquire ownership of the line here for providing intercity rail passenger service. We anticipate that this issue and any other issues of relevance raised by B&M will be addressed during the course of this proceeding during which time all parties will have the opportunity to submit evidence and argument. Indeed, as previously discussed, we are consolidating with this proceeding CV's petition for exemption from 49 U.S.C. 11343, *et seq.*, for the acquisition

---

that there have been on-going negotiations over this line for a significant length of time.

[12] By letter dated March 18, 1988, Amtrak offered $1 million to purchase from B&M or Guilford their property or contract interests in the Conn River Line that are now the subject of this section 402(d) conveyance request. In connection with the sale, Amtrak also offered to grant B&M trackage rights over the acquired property for continuing its present freight operations.

and operation of the subject line and for its proposed trackage rights grant to B&M.

Finally, B&M argues that section 402(d) does not authorize the Commission to compel the conveyance of lines of railroad. However, contrary to B&M's characterization of the legislative history of section 402(d), we believe that Congress has clearly expressed its intent to sanction the acquisition of existing and operating lines of railroad by Amtrak under that provision based on the clear language of the statute. Prior to amendment of section 402(d) by the Railroad Revitalization and Regulatory Reform Act of 1976, P.L. 94-210 (4R Act), the first sentence of the statute provided that Amtrak could apply to the Commission for conveyance of railroad property "required for the construction of tracks and other facilities necessary to provide intercity rail passenger service. . . ." The 4R Act repealed the limiting reference to construction, so the statute now covers any rail property "required for intercity rail passenger service. . . ." This is confirmed by the statement of the Senate Commerce Committee that the intent of the amendment was "to clarify that the powers [of eminent domain] granted by Congress [to Amtrak] in section 305 and 402 of the Rail Passenger Service Act may be used to acquire existing facilities without regard to whether or not construction of new tracks and facilities is involved." S. Rep. No. 499, 94th Cong., 1st Sess. 104 (1975). Moreover, had Congress not intended for Amtrak to have the power to acquire a line of another railroad, it would not have been necessary for it to limit Amtrak's acquisition power by precluding a forced conveyance where such conveyance "would significantly impair the ability of the railroad to carry out its obligations as a common carrier. . . ." *See* section 402(d)(1)(A). Finally, B&M's reliance on a restriction in Amtrak's parallel eminent domain authority under section 305(d) to acquire property interests from non-rail carriers is misplaced. Congress included language in that section precluding Amtrak from exercising its eminent domain authority to acquire property interests owned by a railroad merely to distinguish Amtrak's authority to acquire non-rail owned property under that section from its authority, under section 402(d), to acquire property that is owned by a railroad and gave the Commission jurisdiction to compel the latter due to that agency's expertise in rail matters, including rail valuations. Moreover, the absence of any such restriction in section 402(d) is even further evidence of Congressional intent that Amtrak be empowered to acquire a line of railroad under that provision.[13] Thus, we conclude that section 402(d) does authorize the Commission to compel the conveyance of a line of railroad. Accordingly, B&M's rejection request is denied.[14]

This action will not significantly affect either the quality of the human environment or energy conservation.

It is ordered:

1. A proceeding is instituted under section 402(d) of RPSA.

2. This proceeding will be handled under modified procedure. The parties must comply with the Commission's Rule of Practice, including 49 CFR 1104 and 1112. The procedural schedule measured from the date of service of this decision is set forth in the Appendix. Parties objecting to any aspect of the procedural schedule set forth herein shall file with the Commission and serve on the other parties their objections within 5 days of the date of service of this decision.

---

[13] *See, e.g.*, 49 U.S.C. 11103, where Congress specifically limited the effect of provisions to terminal facilities.

[14] On April 13, 1988, we received a pleading filed by B&M styled "Reply of Boston and Maine Corporation to Supplemental Argument by National Railroad Passenger Corporation in Connection With Application." As we have stated, *supra*, all relevant issues raised by B&M on the merits will be considered during the course of this proceeding.

3. Amtrak must file with the Commission and serve on the parties within 5 days of service of this decision: (1) copies of its agreements with CV; (2) copies of its 1977 operating agreement with B&M; and (3) an environmental report (or state why an environmental report is not required here).

4. B&M's request that the application be rejected is denied.

5. The petitions to intervene filed by the Commonwealth of Massachusetts and the State of Vermont and the Connecticut Department of Transportation are granted.

6. CV's petition for exemption in F.D. 31259 is consolidated for handling with this proceeding.

7. Amtrak's petition for document discovery is granted.

8. CP's petition to intervene is granted.

9. This decision is effective upon date of service.

By the Commission, Chairman Gradison, Vice Chairman Andre, Commissioners Sterrett, Simmons, and Lamboley. Chairman Gradison dissented in part with a separate expression. Commissioner Lamboley, joined by Commissioners Simmons, dissented in part with a separate expression.

Noreta R. McGee
Secretary

(SEAL)

CHAIRMAN GRADISON, dissenting in part:

In my view, the schedule originally proposed by Amtrak presented a more realistic timetable to consider the issues likely to be raised in this proceeding than does the one adopted today by the majority.

COMMISSIONER LAMBOLEY, WITH WHOM COMMISSIONER SIMMONS JOINS, dissenting in part:

These statutory dispute resolution procedures were initiated by an Amtrak filing on April 4, 1988.[1]

Amtrak and others[2] have requested expedited consideration of this application. The statute mandates the Commission to expedite such proceedings and to render decision not later than 120 days.[3]

Since filing there has been an effort to achieve a schedule for expedited action. Recognizing that this action comes to us because the parties could not reach voluntary agreement through negotiations and that the "construction season" in New England is short, it seems to us that 60 days is sufficient time in which to accomplish fair development of the record, argument and decision with respect to both "need" and "just compensation" issues.[4]

We take strong exception to the majority's bifurcation of these issues, and needless delay is scheduling decision on "just compensation." Merely shaving 20 days off the statutory outer limits for decision cannot, in our view, be fairly characterized as "expedited consideration."[5] Moreover, 100 days does little to recognize or make the necessary time available for needed rehabilitation and repair of the line. Decision in August severely restricts that opportunity in New England.

---

[1] 45 USC Sec. 562(d)

[2] The Commonwealth of Massachusetts, the State of Vermont and Windsor Minerals, Inc., and several Senators and Congressmen from New England.

[3] 45 USC Sec. 562(d)(2)

[4] For this purpose an approrpiate 60-day procedural schedule was proposed.

[5] Statutory provision for 6% interest until compensation is paid cannot be construed to extend the 120-day limitation or otherwise require bifurcation in the face of clear congressional intent to expedite the process. See 45 USC Sec. 562(d)(2).

45 U.S.C. § 545. General powers

(d) Acquisition of property; declaration of taking; property compensation; procedures; transfer of title

(1) The Corporation is authorized, to the extent financial resources are available—

(A) to acquire any property which the Secretary, acting in furtherance of his responsibility to design and construct and intermodal transportation terminal at Union Station in the District of Columbia, requests, upon assurance of full reimbursement by the Secretary; and

(B) to acquire any right-of-way, land, or other property (except right-of-way, land, or other property of a railroad or property of a State or political subdivision thereof or of any other governmental agency), which is required [for] intercity rail passenger service;

by the exercise of the right of eminent domain, in accordance with the provisions of this subsection, in the district court of the United States for the judicial district in which such property is located or in any such court if a single piece of property is located in more than one judicial district: *Provided*, That such right may only be exercised when the Corporation cannot acquire such property by contract or is unable to agree with the owner as to the amount of compensation to be paid.

(2) The Corporation shall file with the complaint, or at any time before judgment, a declaration of taking containing or having annexed thereto—

(A) a statement of the public use for which the property is taken;

(B) a description of the property taken sufficient for the identification thereof;

(C) a statement of the estate or interest in the property taken;

(D) a plan showing the property taken; and

(E) a statement of the amount of money estimated by the Corporation to be just compensation for the property taken.

(3) Upon the filing of the declaration of taking and the depositing in the court of the amount of money estimated in such declaration to be just compensation for the property, the property shall be deemed to be condemned and taken for the use of the Corporation. Title to such property shall thereupon vest in the Corporation in fee simple absolute or in any lesser estate or interest specified in the declaration of taking, and the right to the money deposited as estimated just compensation shall immediately vest in the persons entitled thereto. The court, after a hearing, shall make a finding as to the amount of money which constitutes just compensation for such property and shall make an award and enter judgment accordingly. Such judgment shall include, as part of the just compensation awarded, interest on the amount finally awarded as the value of the property on the date of taking minus the amount deposited in the court on such date, at the rate of 6 per centum per annum from the date of taking to the date of payment.

(4) Upon the application of the parties in interest, the court may order that the money deposited in the court, or any part thereof, be paid forthwith for or on account of the just compensation to be awarded in the proceeding. If the compensation finally awarded exceeds the amount of the money received by any person entitled to compensation, the court shall enter judgment against the Corporation for the amount of the deficiency.

(5) Upon the filing of a declaration of taking, the court may fix the time within which, and the terms upon which, the parties in possession are required to surrender possession to the Corporation. The court may make such or-

ders in respect to encumbrances, liens, rents, taxes, assessments, insurance, and other charges, if any, as shall be just and equitable.

45 U.S.C. § 562. Facilities and service agreements

(a) Contracts with railroads or regional transportation agencies; authority of Interstate Commerce Commission; fixing of compensation; agreements with State, local or regional transportation agencies; disagreement procedures; criteria for compensation

(1) The Corporation may contract with railroads or with regional transportation agencies for the use of tracks and other facilities and the provision of services on such terms and conditions as the parties may agree, which terms shall include a penalty for untimely performance. In the event of a failure to agree, the Interstate Commerce Commission shall, within ninety days after application by the Corporation, if it finds that doing so is necessary to carry out the purposes of this chapter, order the provision of services or the use of tracks or facilities of the railroad by the Corporation, on such terms and for such compensation as the Commission may fix as just and reasonable, and the rights of the Corporation to such services or to the use of tracks or facilities of the railroad or agency under such order or under an order issued under subsection (b) of this section shall be conditioned upon payment by the Corporation of the compensation fixed by the Commission. In fixing just and reasonable compensation for the provision of services or for the use of tracks and facilities ordered by the Commission under the preceding sentence, the Commission shall, in fixing compensation in excess of incremental costs, consider quality of service as a major factor in determining the amount (if any) of such compensation. If the amount of compensation fixed is not duly and promptly paid, the railroad or agency entitled thereto may bring an action against the Corporation to recover the amount properly owed.

(2) Notwithstanding any other provision of this chapter, the Corporation may enter into agreements with any other

railroads and with any State (or local or regional transportation agency) responsible for providing commuter rail or rail freight services over tracks, rights-of-way, and other facilities acquired by the Corporation pursuant to authority granted by the Regional Rail Reorganization Act of 1973 [45 U.S.C.A. § 701 et seq.] and the Railroad Revitalization and Regulatory Reform Act of 1976 [45 U.S.C.A. § 801 et seq.]. In the event of a failure to agree, the Commission shall order that rail services continue to be provided, and it shall, consistent with equitable and fair compensation principles, decide, within 120 days after the date of submission of a dispute to the Commission, the proper amount of compensation for the provision of such services. The Commission, in making such a determination, shall not permit cross subsidization between intercity rail passenger service and rail freight services. The Commission, in making such a determination, shall assign to a freight railroad obtaining services pursuant to this paragraph the costs incurred by the Corporation solely for the benefit of that railroad, plus a proportionate share of all other costs of providing services covered by this paragraph that are incurred for the common benefit of the Corporation and such freight railroad. The proportionate share of such other costs assigned to a freight railroad shall be based on relative measures of volume of car operations, tonnage, or other factors that reasonably reflect the relative use of the rail properties covered by this paragraph. Nothing in this paragraph shall be construed to preclude parties from entering into an agreement under this paragraph either before or after a determination of the Commission under this paragraph.

(b) Immediate availability of tracks and other facilities

To facilitate the initiation of operations by the Corporation within the basic system, the Commission shall, upon application by the Corporation, require a railroad to make immediately available tracks and other facilities. The Commission shall thereafter promptly proceed to fix such terms and conditions as are just and reasonable.

(c) Emergency measures

To facilitate such operations by the Corporation as may be deemed by it to be necessary in an emergency, the Commission shall, upon application by the Corporation, require a railroad to make immediately available tracks and other facilities for the duration of such emergency. The Commission shall thereafter promptly proceed to fix such terms and conditions as are just and reasonable including indemnification of the railroad by the Corporation against any casualty risk to which it may be exposed.

(d) Disagreement procedures

(1) If the Corporation and a railroad are unable to agree upon terms for the sale of the Corporation of property (including interests in property) owned by the railroad and required for intercity rail passenger service, the Corporation may apply to the Commission for an order establishing the need of the Corporation for the property at issue and requiring the conveyance thereof from the railroad to the Corporation on reasonable terms and conditions, including just compensation. Unless the Commission finds that—

> **(A)** conveyance of the property to the Corporation would significantly impair the ability of the railroad to carry out its obligations as a common carrier; and
>
> **(B)** the obligations of the Corporation to provide modern, efficient, and economical rail passenger service can adequately be met by the acquisition of alternative property (including interests in property) which is available for sale on reasonable terms to the Corporation, or available to the Corporation by the exercise of its authority under section 545(d) of this title;

the need of the Corporation for the property shall be deemed to be established and the Commission shall order the conveyance of the property to the Corporation on such reasonable terms and conditions as it may prescribe, including just compensation.

(2) The Commission shall expedite proceedings under this subsection and, in any event, issue its order within one hundred and twenty days from receipt of the application from the Corporation. If just compensation has not been determined on the date of the order, the order shall require, as part of just compensation, interest at the rate of 6 per centum per annum from the date prescribed for conveyance until just compensation is paid.

(e) Preferences for intercity or commuter passenger trains

(1) Except in an emergency, intercity or commuter passenger trains operated by or on behalf of the Corporation shall be accorded preference over freight trains in the use of any given line of track, junction, or crossing, unless the Secretary has issued an order to the contrary in accordance with paragraph (2) of this subsection.

(2) Any railroad whose rights with regard to freight train operation are affected by paragraph (1) of this subsection may file an application with the Secretary requesting appropriate relief. If, after hearing under section 553 of Title 5, the Secretary finds that adherence to such paragraph (1) will materially lessen the quality of freight service provided to shippers, the Secretary shall issue an order fixing rights of trains, on such terms and conditions as are just and reasonable.

(f) Accelerated speeds

If, upon request of the Corporation, a railroad refuses to permit accelerated speeds by trains operated by or on behalf of the Corporation, the Corporation may apply to the Secretary for an order requiring the railroad to permit

such accelerated speeds. The Secretary shall make findings as to whether such accelerated speeds are unsafe or otherwise impracticable, and with respect to the nature and extent of improvements to track, signal systems, and other facilities that would be required to make such accelerated speeds safe and practicable. After hearing, the Secretary shall issue an order fixing maximum permissible speeds of Corporation trains, on such terms and conditions as he shall find to be just and reasonable.

(g) Operation of additional trains

Upon receipt of an application from the Corporation in any situation where the Corporation is unable to obtain a satisfactory, voluntary agreement from a rail carrier for operation of additional trains on the rail lines of that rail carrier, the Secretary may, after a hearing on the record, order such rail carrier, within 60 days, to permit or provide requested operation of trains of the Corporation over such rail lines on schedules based upon legally permissible operating times. If the Secretary determines not to hold a hearing, the Secretary, within 30 days after receipt of an application from the Corporation, shall publish in the Federal Register his reasons for not holding a hearing. Any such hearing must include a consideration of whether such an order would unduly impair freight operations of the rail carrier involved, and the burden shall be on the rail carrier seeking to oppose the operation of an additional train to demonstrate that the requested operation will impair freight operations. In establishing such scheduled running times, the Secretary shall give proper consideration to the statutory goal that the Corporation shall implement schedules which will attain a system-wide average speed of at least 55 miles per hour which can be adhered to with a high degree of reliability and passenger comfort. The compensation payable by the Corporation to a rail carrier for an operation ordered pursuant to this subsection shall be that which is properly established pursuant to an agreement between the Corporation and such rail

carrier, or, in the absence of an applicable agreement, shall be determined by the Commission in a proceeding pursuant to subsection (a) of this section.

The Independent Safety Board Act Amendments of 1990, Pub. L. No. 101-641, § 9, 104 Stat. 4654, 4658 (November 28, 1990)

Section 9(a). Section 402(d)(1) of Rail Passenger Service Act (45 U.S.C. § 562(d)(1)) is amended by adding at the end the following new sentence:

> "The Corporation may subsequently convey title or other interest in such property to a third party, if such reconveyance is found by the Commission to further the purposes of this Act.".

(b) The amendment made by subsection (a) shall apply to any proceeding instituted before, on, or after the date of enactment of this Act (including any such proceeding pending before any Federal court on such date of enactment).